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IN THE
Supreme Court of the United States

THE STATE OF OHIO,
Petitioner,

v.

THOMAS L. VENNEY,
Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of Ohio**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. This criminal defendant approved a written plea in which he acknowledged his understanding of various constitutional rights and in which he waived those rights, and he further acknowledged in open court that he approved the written plea and had reviewed his constitutional rights with his counsel. Did the constitutional standard under *Boykin v. Alabama*, 395 U.S. 238 (1969), require that the trial court go further and provide specific oral advisements and obtain specific oral waivers regarding such constitutional rights?
- II. The *Boykin* Court held that the record of proceedings must affirmatively disclose the waiver of three constitutional rights, *i.e.*, the right against compelled self-incrimination, the right to jury trial, and the right to confront witnesses. Should the list of three *Boykin* rights be expanded to include the constitutional right to require proof beyond a reasonable doubt in a trial?
- III. Assuming that an oral advisement is constitutionally required, does the failure to give such an advisement require automatic reversal when other parts of the trial-court record, including the defendant's written plea, show that the defendant was aware of the right to proof beyond a reasonable doubt and was waiving that right?



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INTRODUCTION

In *Boykin v. Alabama*, 395 U.S. 238 (1969), this Court found that due process was violated when the Alabama trial court had accepted the defendant's guilty plea without the record affirmatively disclosing that the defendant was aware of three constitutional rights: (1) the right to jury trial; (2) the right to confront witnesses; (3) the right not to be compelled to testify against himself. The "wholly silent" record was not sufficient to comply with due process. *Id.* at 240.

Ohio's Crim.R. 11(C)(2)(c) goes beyond *Boykin* in at least two ways. It requires that the trial court orally advise the defendant of certain constitutional rights. *Boykin* had not purported to set forth an oral-advisement requirement but rather only required that the record affirmatively disclose that the defendant was aware of the rights. In addition, Ohio's Crim.R. 11(C)(2)(c) requires such oral advisement not only as to the three *Boykin* rights but also as to the right to compulsory process and the right to require the prosecution to prove guilt beyond a reasonable doubt at a trial.

In the present case, no oral beyond-reasonable-doubt advisement was given, but that advisement and respondent's waiver thereof were specifically set forth in a written Entry of Guilty Plea approved by respondent. Respondent orally acknowledged his approval of the Entry and, further, orally acknowledged that he had reviewed his constitutional rights with his attorney. In light of these matters of record, the lack of the oral advisement was harmless. Nor was there any error under *Boykin*, since the record affirmatively disclosed respondent's awareness of the right and his waiver thereof.

Even so, the Ohio Supreme Court concluded that the guilty plea must be vacated. Without even mentioning the Entry of Guilty Plea, the Ohio Supreme Court concluded that the lack of an oral advisement on the beyond-reasonable-doubt right rendered the plea "constitutionally infirm," and the court further found that such error required automatic reversal.

The Ohio Supreme Court's ruling was constitutional in nature, see Jurisdictional Statement below, and that ruling amounts to a controversial extension of *Boykin* by requiring an oral advisement as to the

presumption of innocence. At least ten of the federal circuit courts and a greater number of state supreme courts have concluded that specific oral articulation of the rights is not constitutionally required under *Boykin*, even as to the three *Boykin* rights.

“[T]he overwhelming weight of authority no longer supports the proposition that the federal Constitution requires reversal when the trial court has failed to give explicit admonitions on each of the so-called *Boykin* rights.” *People v. Howard*, 1 Cal.4th 1132, 1175, 824 P.2d 1315, 1339 (1992). “[T]he high court has never read *Boykin* as requiring explicit admonitions on each of the three constitutional rights.” *Id.* at 1177, 824 P.2d at 1341. “There is wide agreement both on this point and on the applicable test: The record must affirmatively demonstrate that the plea was voluntary and intelligent under the totality of the circumstances.” *Id.* at 1178 & n. 18, 842 P.2d at 1341 & n. 18 (collecting cases). “[T]he federal appellate courts have expressly rejected” the view that specific oral articulation is required. *Id.* at 1177-78, 842 P.2d at 1341; *see also*, *Jhun v. State*, 2004 Haw. LEXIS 348 (Haw. 2004) (collecting cases; “this is the prevailing view among the federal appellate courts.”).

A smaller number of courts have concluded that *Boykin* does not extend beyond the three *Boykin* rights to require that the record affirmatively disclose the defendant’s awareness of the presumption of innocence.

It is noteworthy that Fed.R.Crim.P. 11 does not explicitly require an oral beyond-reasonable-doubt advisement. But under the Ohio Supreme Court’s flawed constitutional ruling, Fed.R.Crim.P. 11 would be unconstitutional in that respect. Given the large number of cases rejecting any “specific articulation”

requirement for even the *Boykin* rights, and given the courts concluding that the presumption of innocence is not a *Boykin* right at all, the first and second questions presented for review warrant the granting of a writ of certiorari.

The third question presented also warrants review, as the Ohio Supreme Court's requirement of automatic reversal conflicts with this Court's structural-error doctrine. The Ohio Supreme Court failed to address the prosecution's contentions under Ohio's Crim.R. 52(A) and (B) that harmless-error and plain-error review must apply to the omission of the oral beyond-reasonable-doubt advisement. The Court also failed to address the prosecution's contention that the omission of the advisement did not amount to structural error. The Court simply concluded that a rule of automatic reversal must apply.

While this Court cannot review the Ohio Supreme Court's failure to address its own rules regarding harmless-error and plain-error review, the Ohio Supreme Court's constitutional analysis called for an assessment of harmless error under constitutional standards. Harmless-error analysis for federal constitutional errors is a federal question. *Chapman v. California*, 386 U.S. 18, 21 (1967).

Under this Court's structural-error doctrine, the Ohio Supreme Court's automatic-reversal holding is untenable. A court's failure to give an oral advisement could be rendered harmless in any number of ways, including the defendant having received the advisement in an earlier hearing or the defendant, as in the present case, having approved a written Entry of Guilty Plea containing such advisement. This Court has stated that, in the context of error under Fed.R.Crim.P. 11, the omission of a single advise-

ment is not even colorably structural. *United States v. Dominguez-Benitez*, 542 U.S. 74, 81 n. 6 (2004).

The Ohio Supreme Court did not explain how such an omission could be structural, despite the prosecution's citation to *Dominquez-Benitez* and citation to this Court's structural-error analysis. The Ohio Supreme Court should have conducted a harmless-error review. Its requirement of automatic reversal is disproportionate to the purported constitutional error committed, and it unnecessarily requires litigants and victims to "start over" even in the face of affirmative evidence that the error was harmless.

OPINIONS BELOW

On March 22, 2007, the Ohio Court of Appeals, Tenth Appellate District, reversed respondent's conviction in a 2-1 vote, concluding that a standard of strict compliance required reversal because no oral beyond-reasonable-doubt advisement was given at the time of respondent's guilty plea. *State v. Veney*, 2007 Ohio 1295 (2007).

The Ohio Supreme Court accepted review over the prosecution's discretionary and certified-conflict appeals. On October 9, 2008, the Ohio Supreme Court affirmed in a 4-3 vote, concluding that the lack of an oral beyond-reasonable-doubt advisement rendered the guilty plea "constitutionally infirm." *State v. Veney*, 120 Ohio St.3d 176, 2008 Ohio 5200, 897 N.E.2d 621 (2008).

On December 3, 2008, the Ohio Supreme Court denied the prosecution's timely October 15, 2008, motion for reconsideration in the same 4-3 vote. *State v. Veney*, 120 Ohio St.3d 1423, 2008 Ohio 6166, 897 N.E.2d 655 (2008).

The opinions of the Ohio Supreme Court and Ohio Court of Appeals are included in the appendix, as are the two entries of the Ohio Supreme Court denying reconsideration.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari was timely filed within ninety days of the Ohio Supreme Court's entries denying the prosecution's timely motion for reconsideration on December 3, 2008. Section 1257(a) of Title 28 of the United States Code confers jurisdiction on this Court to address whether the Ohio Supreme Court properly applied the federal due process principles of *Boykin v. Alabama*, 395 U.S. 238 (1969), and whether the Ohio Supreme Court erred in failing to apply federal harmless-error review to the purported due process violation.

Respondent will likely contend that the Ohio Supreme Court based its ruling on an adequate and independent state ground by relying on Ohio Crim.R. 11(C)(2)(c), which requires that the court give an oral beyond-reasonable-doubt advisement to a defendant pleading guilty. But the Ohio Supreme Court's ruling did not satisfy this Court's "plain statement" standard by clearly relying on the state rule as an adequate and independent basis for decision. *Michigan v. Long*, 463 U.S. 1032, 1044 (1983). The Ohio Supreme Court's chief focus was on *Boykin* and whether the plea was "constitutionally infirm" in the absence of an oral beyond-reasonable-doubt advisement.

The prosecution had specifically argued that the oral advisement was not constitutionally required because it was not amongst the narrow list of three *Boykin* rights and because *Boykin* does not require an oral advisement at all, even for those three *Boykin*

rights. The Ohio Supreme Court summarized the prosecution's argument in paragraph 20 of its opinion and then, in paragraph 21, "reject[ed] the state's contention."

Subsequent parts of the opinion confirm that the Court believed that the omission of the oral beyond-reasonable-doubt advisement was constitutional error. In paragraph 26, the Court concluded that, under *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), a plea is "constitutionally infirm" if the oral plea colloquy omits one of the five constitutional rights listed in Ohio's Crim.R. 11(C)(2)(c). In paragraph 24, the Court stated that, under *Ballard* and *Boykin*, "a defendant must be apprised of certain constitutional rights * * *," and then held in footnote 3 that "the principles applicable to the '*Boykin* rights' extend to all five rights listed in Crim.R. 11(C)(2)(c) in Ohio."

In paragraph 29, the Court quoted *Boykin* for the proposition that "We cannot presume a waiver of these * * * important federal rights from a silent record," omitting the key word "three" from the *Boykin* phrase "these three important federal rights." The Court then stated that, "When the record confirms that the trial court failed to perform this duty, the defendant's plea is constitutionally infirm making it presumptively invalid."

In total, the Ohio Supreme Court cited or quoted *Boykin* eight times in the key passages of paragraphs 24 through 30 in reaching the conclusion that the plea was "constitutionally infirm." Although the Court also referred to Ohio Crim.R. 11(C)(2)(c), its ruling was bottomed on a finding of a constitutional violation.

Any retreat by the Ohio Supreme Court from that understanding would have meant that the appeal must be decided in favor of the prosecution. The Court's requirement of per se reversal represented a "structural error" resolution of the case, but, under that Court's prior cases, only constitutional error could amount to "structural error" always requiring reversal. "If an error in the trial court is not a constitutional error, then the error is not structural error." *State v. Colon*, 118 Ohio St.3d 26, 2008 Ohio 1624, 885 N.E.2d 917, ¶ 21 (2008). The Court's ruling requiring per se reversal necessarily meant that it had found a constitutional error. And given the frequent reliance on *Boykin*, and the reference to "federal rights" in paragraph 29, the Court's ruling was a *federal* constitutional ruling.

In an effort to show an adequate and independent state ground, respondent would likely contend that the Ohio Supreme Court's syllabus only referred to Ohio's Crim.R. 11(C)(2)(c). But the syllabus also referred to several federal constitutional rights, and so the syllabus is not strictly tied to state law.

Moreover, Ohio no longer follows the "syllabus rule." See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 565-66 nn. 2 & 3 (1977) (discussing the syllabus rule). The law of an Ohio Supreme Court decision is now found in the syllabus "and its text, including footnotes." See Ohio Sup. Ct. Rules for Reporting Opinions, § 1(B)(1). Thus, the syllabus sets forth the automatic-reversal principle – "the defendant's plea is invalid" – and the text explains why that is so, *i.e.*, because the plea is "constitutionally infirm."

At a minimum, the Ohio Supreme Court's syllabus and opinion constitute an interwoven mixture of fed-

eral constitutional law and state criminal procedure. The Court determined the issue of "strict compliance" by reference to whether the plea was "constitutionally infirm." "It appears to us that the state court 'felt compelled by what it understood to be federal constitutional considerations to construe * * * its own law in the manner it did.'" *Long*, 463 U.S. at 1044, quoting *Zacchini*, 433 U.S. at 568; *see also*, *Ohio v. Reiner*, 532 U.S. 17, 20 (2001). This interwoven constitutional ruling provides a sufficient basis for this Court to grant a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, as follows:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law
* * *

STATEMENT OF THE CASE

On July 16, 2004, respondent Thomas Veney was indicted on counts of felonious assault and kidnapping, both with one-year and three-year firearm specifications. On February 1, 2006, respondent pleaded guilty to the stipulated lesser included offense of attempted felonious assault, a third-degree felony, with a three-year firearm specification.

At the plea hearing, respondent acknowledged his signature on the Entry of Guilty Plea and acknowledged that his attorney had reviewed his constitutional rights with him.

THE COURT: Okay. Now, Mr. Vinie (sic), is that your signature on this guilty plea form?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: Now, relative to both of these cases, you have reviewed your constitutional rights with Mr. Ellis [defense counsel]?

THE DEFENDANT: Yes, sir.

(Plea and Stc. Tr. 3, 4)

The court orally addressed various constitutional rights, including the right to jury trial, and respondent said he understood that he was giving up those rights. (Plea and Stc. Tr. 4-5) However, the court did not expressly discuss with respondent the legal requirement that such a trial would require the prosecution to prove its case beyond a reasonable doubt.

The Entry of Guilty Plea signed by respondent did discuss that right, stating, as follows:

I understand that my guilty plea to the crime specified constitute(s) both an admission of guilt and a waiver of any and all constitutional, statutory, or factual defenses with respect to such crime and this case. I further understand that by pleading "Guilty", *I waive a number of important and substantial constitutional, statutory and procedural rights*, which include, but are not limited to, the right to have a trial by jury, the right to confront witnesses against me, to have compulsory subpoena process for obtaining witnesses in my favor, *to require the State to prove my guilt beyond a reasonable doubt* on each crime herein charged at a trial at which I cannot be compelled to testify against myself, and to appeal the verdict and rulings of the trial Court made before or during trial, should those rulings or the verdict be against my interests. (Emphasis added)

Counsel also certified in the Entry that he had counseled defendant to the best of his professional ability as to the facts and law and that defendant was "act[ing] knowingly, voluntarily, and intelligently in such matter."

At the subsequent sentencing hearing, the court imposed a two-year sentence for the third-degree felony and the mandatory consecutive three-year prison term for the firearm specification. (Plea and Stc. Tr. 13)

On appeal, respondent argued that the plea was invalid under Ohio Crim.R. 11(C)(2)(c) because the trial court failed to orally advise respondent of the beyond-reasonable-doubt burden of proof. (Defense Brief, at pp. 3-7) Respondent contended that a standard of "strict compliance" should apply, which would require automatic reversal for a violation of the rule. (*Id.*)

The prosecution opposed that argument, contending that a standard of "substantial compliance" should apply because the oral beyond-reasonable-doubt advisement was not required by constitutional standards and was only required by the rule. (Prosecution Brief, at pp. 3-7) The prosecution repeatedly noted that the advisement was not constitutionally required. (*Id.* at pp. 4-5) The prosecution cited, *inter alia*, a previous Ohio Supreme Court decision recognizing that an oral advisement of the beyond-reasonable-doubt right "is not required by *Boykin* * * *." (*Id.* at p. 4, quoting *State v. Sturm*, 66 Ohio St.2d 483, 484 n. 2, 422 N.E.2d 853, 854 n. 2 (1981))

In invoking a "substantial compliance" standard, the prosecution was contending that the defense must show prejudice. (Prosecution Brief, at p. 4)

Given the Entry of Guilty Plea approved by respondent, and given his oral acknowledgement that he had discussed his constitutional rights with counsel, the prosecution contended that respondent had not shown prejudice. (*Id.* at p. 5)

In its 2-1 ruling, the Ohio Court of Appeals determined that the issue of "strict compliance" turned on whether the oral advisement required by the Ohio rule was a "critical constitutional requirement." Court of Appeals Opinion, at ¶ 7. The court concluded that the advisement was a constitutional requirement, that a strict-compliance standard therefore applied, and that the plea must be reversed without any assessment of prejudice. *Id.* at ¶¶ 15, 16.

In the prosecution's appeals to the Ohio Supreme Court, the prosecution reiterated its contention that the advisement was not constitutionally required and therefore that a substantial compliance standard should apply. The prosecution argued that the right to proof beyond a reasonable doubt was not a *Boykin* right. (Prosecution Merit Brief, at pp. 6-9, 11-14, 22; Reply Brief, at pp. 5, 6) The prosecution further contended that, even if the beyond-reasonable-doubt right was a *Boykin* right, *Boykin* did not require a specific oral advisement; the Entry of Guilty Plea was enough constitutionally. (Prosecution Merit Brief, at pp. 14-15; Reply Brief, at pp. 5-6) As stated in the prosecution's merit brief:

The beyond-reasonable-doubt standard is simply not among the narrow list of three *Boykin* rights, and a specific beyond-reasonable-doubt oral advisement would not be constitutionally required. Written plea documentation, such as that involved in the present case, is sufficient to satisfy the *Boykin* constitutional standard of providing

evidence in the record of a knowing, voluntary, and intelligent plea.

(Prosecution Merit Brief, at pp. 14-15)

Because the error was a mere violation of the rule, the prosecution argued for “substantial compliance” review and contended that, under such review, there was no prejudice shown. (Prosecution Merit Brief, at pp. 8-9) The prosecution relied heavily on this Court’s decision in *United States v. Vonn*, 535 U.S. 55 (2002), which recognized that the entire record should be reviewed in determining whether unobjected-to plea-advisement error requires reversal. (Prosecution Merit Brief, at pp. 16-17)

The prosecution contended that the failure to give the oral advisement was not “structural error” because the error was not constitutional in nature and because the error did not make it impossible to conduct a harmless-error review. (Prosecution Merit Brief, at pp. 21-22; Reply Brief, at pp. 6-11) The prosecution contended that any error was harmless. (Prosecution Merit Brief, at p. 25; Reply Brief, at pp. 2, 14)

Respondent contended that the failure to give the oral advisement was constitutional in nature, (Defense Merit Brief, at pp. 11, 17), and that it was structural error. (*Id.* at pp. 16-17)

In its 4-3 ruling, the Ohio Supreme Court rejected the prosecution’s constitutional arguments, found that the plea was “constitutionally infirm,” and adopted a “strict compliance” standard that amounted to a rule of automatic reversal for the plea-advisement error.

In the prosecution's timely motion for reconsideration filed in both appeals on October 15, 2008, the prosecution contended, *inter alia*, that the Ohio Supreme Court had erred in constitutionalizing the oral beyond-reasonable-doubt advisement required by Crim.R. 11(C)(2)(c), since the right to proof beyond a reasonable doubt is not one of the *Boykin* rights and since oral advisements are not required for *Boykin* rights anyway. (Motion for Reconsideration, at pp. 3-7) The prosecution also contended that the Ohio Supreme Court had failed to address the prerequisites for treating error as "structural" error. (Id. at pp. 13-15) The Ohio Supreme Court nevertheless denied the motion for reconsideration.

ARGUMENT

I. THE DUE PROCESS STANDARD OF *BOYKIN* V. *ALABAMA* DOES NOT REQUIRE AN ORAL ADVISEMENT OF A CONSTITUTIONAL RIGHT. WRITTEN PLEA DOCUMENTATION CAN BE SUFFICIENT TO AFFIRMATIVELY DISCLOSE THAT THE DEFENDANT WAS AWARE THAT HE WAS WAIVING THE PERTINENT CONSTITUTIONAL RIGHTS.

The Ohio Supreme Court's constitutionalization of Ohio's state-law oral-advisement requirement creates a substantial conflict with decisions of other courts and even with prior decisions of the Ohio Supreme Court itself. Even if the presumption of innocence were a *Boykin* right, the Ohio Supreme Court failed to recognize that *Boykin* would not require an oral advisement of that right.

The Ohio Supreme Court had previously recognized that "specific oral interrogation" is not constitu-

tionally required for even the original three *Boykin* rights.

Even though, as stated in Crim. R. 11(C)(2), trial courts should in every cause ascertain the validity of waivers, of constitutional and non-constitutional rights, by specific oral interrogation of the defendant, *there is no constitutional mandate that such be done*. Numerous authorities have refused to *ipso facto* invalidate a guilty plea merely because the trial court failed to conduct a full colloquy with the defendant with regard to each of his rights, or because the court accepted a *written document from the defendant as evidence that he had been apprised of and knowingly waived his constitutional rights*.

State v. Billups, 57 Ohio St.2d 31, 36-37 & nn. 3 & 4, 385 N.E.2d 1308, 1311-12 & nn. 3 & 4 (1979) (some emphasis added; collecting cases); *State v. Stone*, 43 Ohio St.2d 163, 165, 331 N.E.2d 411, 413 (1975) ("The *Boykin* decision did not specifically require that a defendant's rights be enumerated and explained by the trial court in all cases in order for a waiver to be knowing and voluntary.").

In addition to creating a conflict with its own prior decisions, the Ohio Supreme Court created a conflict with a strong body of national case law. "[T]he new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and knowingly." *Wilkins v. Erickson*, 505 F.2d 761, 763 (9th Cir. 1974), quoting *Brady v. United States*, 397 U.S. 742, 747-48 n. 4 (1970). The question is whether the record as a whole shows the voluntary and intelligent nature of the plea; "[S]pecific articulation of the *Boykin* rights is not the sine qua

non of a valid guilty plea." *Wilkins*, 505 F.2d at 763, 764.

As early as 1976, the Maryland Court of Appeals properly observed that "[m]any courts, both federal and state, have reached the same conclusion as to *Boykin's* meaning." *Davis v. State*, 278 Md. 103, 116, 361 A.2d 113, 121 (1976) "*Boykin* does not require specific reference to and waiver of the three rights * * *." *Id.* The Maryland court also found it significant that some states had retreated from their initial holdings that a specific oral enumeration was required. *Id.* at 117-18, 361 A.2d at 121. By 1992, the California Supreme Court concluded that the weight of authority was "overwhelming" in rejecting any interpretation of *Boykin* that would require a specific oral articulation of the *Boykin* rights. *Howard*, 1 Cal.4th at 1175, 824 P.2d at 1339.

As things now stand, several federal circuit courts and state courts of last resort have rejected the view that specific oral advisements are required under *Boykin*.

1st Circuit: *United States v. Ward*, 518 F.3d 75, 83, 84, 86 (1st Cir. 2008) ("A specific script, a set of magic words, or even certain types of inquiries are not required."; totality of record is reviewed, including documents; "*Boykin* does not constitutionalize Rule 11 for state plea proceedings.").

3rd Circuit: *Hill v. Beyer*, 62 F.3d 474, 481 (3rd Cir. 1995) ("[t]he failure to specifically articulate *Boykin* rights * * * is not dispositive if the circumstances otherwise establish that the plea was constitutionally acceptable.").

4th Circuit: *Wade v. Coiner*, 468 F.2d 1059, 1060 (4th Cir. 1972) ("state judges may choose to

engage in the colloquy mandated for their federal colleagues by Rule 11, but there is nothing in *Boykin* that requires them to do so.”).

5th Circuit: *McChesney v. Henderson*, 482 F.2d 1101, 1106, 1110 (5th Cir. 1973) (“there is no requirement that there be express articulation and waiver of the three constitutional rights referred to in *Boykin*”).

6th Circuit: *Fontaine v. United States*, 526 F.2d 514, 516 (6th Cir. 1975) (collecting cases; “*Boykin* does not require separate enumeration of each right waived and separate waivers as to each.”).

7th Circuit: *United States v. Wagner*, 996 F.2d 906, 913 (7th Cir. 1993) (“A failure to advise the defendant of the rights specified by *Boykin* does not necessarily invalidate the plea.”) (internal citations omitted).

8th Circuit: *Todd v. Lockhart*, 490 F.2d 626, 628 n. 1 (8th Cir. 1974) (“we agree that *Boykin* does not require the express articulation and waiver of these three rights at the time the plea is entered.”).

9th Circuit: *Wilkins*, 505 F.2d at 763, 764.

10th Circuit: *Stinson v. Turner*, 473 F.2d 913, 915-16 (10th Cir. 1973) (“we do not believe that *Boykin* requires the enumeration of rights and the multiple waivers contended for by appellant.”).

11th Circuit: *United States v. Simmons*, 961 F.2d 183, 187 (11th Cir. 1992) (“This Circuit, however, has construed *Boykin* to require only that courts establish a record that generally reveals affirmative awareness of the consequences of a guilty plea.”; internal quotation marks omitted).

Alaska: *Barrett v. State*, 544 P.2d 830, 833-834 (Alaska 1975).

California: *Howard*, 1 Cal.4th at 1175, 824 P.2d at 1339.

Colorado: *People v. Wade*, 708 P.2d 1366, 1369 (Colo. 1985) ("Boykin did not require a specific waiver of even the three constitutional rights highlighted in the *Boykin* opinion.").

Idaho: *State v. Colyer*, 98 Idaho 32, 35-36, 557 P.2d 626, 629-30 (1976).

Illinois: *In re Beasley*, 66 Ill.2d 385, 392, 362 N.E.2d 1024, 1027 (1977).

Indiana: *Dewitt v. State*, 755 N.E.2d 167, 171 (Ind. 2001).

Maryland: *Davis*, 278 Md. at 116, 361 A.2d at 121.

Massachusetts: *Commonwealth v. Morrow*, 363 Mass. 601, 604, 296 N.E.2d 468, 472-73 (1973).

Minnesota: *State v. Propotnik*, 299 Minn. 56, 57-58, 216 N.W.2d 637, 638 (1974).

North Dakota: *State v. Storbakken*, 246 N.W.2d 78, 83-84 (N.D. 1976).

South Carolina: *State v. Lambert*, 266 S.C. 574, 579, 225 S.E.2d 340, 342 (1976).

South Dakota: *State v. Beckley*, 742 N.W.2d 841, 844 (S.D. 2007).

Tennessee: *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993).

Washington: *Wood v. Morris*, 87 Wash.2d 501, 508, 554 P.2d 1032, 1036 (1976).

Consistent with the foregoing cases, this Court has characterized the holding of *Boykin* in terms of whether the record provided adequate evidence of waiver, not whether an oral advisement had been given. In *Dominguez-Benitez*, 542 U.S. at 84 n. 10, this Court cited *Boykin* for the proposition that, "when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed." Certiorari review is warranted here so that this Court can precisely delineate the limited reach of the *Boykin* decision.

Review would also overturn the Ohio Supreme Court's constitutionalization of its criminal rule. The Ohio Supreme Court's ruling has the effect of elevating the violation of a state oral-advisement rule to the level of federal constitutional error. But, as the prosecution had pointed out, a "mere error of state law" is not a violation of due process, *Engle v. Isaac*, 456 U.S. 107, 121 n. 21 (1977), especially a mere violation of Ohio's Crim.R. 11. *Riggins v. McMackin*, 935 F.2d 790, 794-95 (6th Cir. 1991). Certiorari review would clarify that state courts should not elevate their state-law oral-advisement requirements into federal constitutional law under *Boykin*.

II. AS A MATTER OF DUE PROCESS UNDER *BOYKIN*, THE RECORD NEED ONLY AFFIRMATIVELY DISCLOSE THE WAIVER OF THREE CONSTITUTIONAL RIGHTS: THE RIGHT AGAINST COMPELLED SELF-INCRIMINATION, THE RIGHT TO JURY TRIAL, AND THE RIGHT TO CONFRONT WITNESSES.

In adding the presumption of innocence to the list of *Boykin* rights, the Ohio Supreme Court overlooked

a number of post-*Boykin* cases from this Court, each of which recognizes that *Boykin* is limited to the three rights mentioned therein.

As stated in *Godinez v. Moran*, 509 U.S. 389, 397 n. 7 (1993), “[a] criminal defendant waives *three* constitutional rights when he pleads guilty: the privilege against self-incrimination, the right to a jury trial, and the right to confront one’s accusers.” (Emphasis added) In *United States v. Ruiz*, 536 U.S. 622, 628-29 (2002), the Court cited *Boykin* and stated that, “[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees” because “pleading guilty implicates the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one’s accusers, and the Sixth Amendment right to trial by jury.” See also, *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (“guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one’s accusers”); *Parke v. Raley*, 506 U.S. 20, 29 (1992) (“guilty plea constitutes a waiver of three constitutional rights”). As these statements show, this Court has not expanded the list of three *Boykin* rights.

Due process does not require that a plea colloquy address every constitutional right or every potential defense. As this Court has recognized, “Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required.” *United States v. Broce*, 488 U.S. 563, 573 (1989). As confirmed by *Ruiz*, 536 U.S. at 629, “the Constitution, in respect to a defendant’s awareness of relevant circumstances, does not require com-

plete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor."

In requiring an oral beyond-reasonable-doubt advisement as a constitutional matter, the Ohio Court of Appeals relied on a dissent from a denial of a petition for writ of certiorari in *Johnson v. Ohio*, 419 U.S. 924 (1974), in which the dissenters opined that the three *Boykin* rights were illustrative and not exhaustive. However, "[w]hile some members of the U.S. Supreme Court have suggested that the *Boykin* list is not exhaustive, they have not prevailed." *White v. State*, 497 N.E.2d 893, 897 (Ind. 1986). It is noteworthy Fed.R.Crim.P. 11 does not explicitly require a beyond-reasonable-doubt oral advisement.

An extension of *Boykin* beyond the three listed trial rights to include other trial rights would create a cumbersome constitutional procedure. A criminal defendant has many constitutional trial rights, including the right to testify, the right to be present, the right to counsel, the right to a public trial, and on and on. Due process simply does not require that a plea colloquy address every constitutional trial right or every potential defense. "[T]here is no requirement that a defendant be presented with a laundry list of constitutional rights that are waived by a plea of guilty or that he make a separate waiver of each for the purpose of the record." *Lyles v. State*, 745 S.W.2d 567, 568 (Tex. App. 1988).

Insofar as the presumption of innocence is concerned, other courts have concluded that a beyond-reasonable-doubt advisement is not constitutionally required. *United States v. Nelson*, 1991 U.S. App.

Lexis 30002 (9th Cir. 1991) ("neither *Boykin* nor any subsequent Supreme Court or Ninth Circuit case requires such an explanation before a defendant pleads guilty."); *State v. Aranda*, 574 P.2d 489, 490 (Ariz. App. 1978) ("*Boykin* * * * does not require it"); *Wade*, 708 P.2d at 1369-70 (no specific advisement of burden of proof constitutionally required); *Colyer*, 98 Idaho at 33 n.1, 557 P.2d at 627 n. 1; *People v. Saffold*, 465 Mich. 268, 281, 631 N.W.2d 320, 328 (2001) ("Although we continue to recognize the importance of the presumption of innocence, we decline to elevate it to the status of the *Boykin/Jaworski* rights.").

Certiorari review is warranted to determine whether *Boykin* will be limited to the three constitutional rights listed therein or whether that list must be expanded to include other constitutional trial rights.

III. THE LACK OF AN ORAL ADVISEMENT DOES NOT AMOUNT TO STRUCTURAL ERROR REQUIRING AUTOMATIC REVERSAL. OTHER PARTS OF THE RECORD, INCLUDING THE DEFENDANT'S WRITTEN PLEA, CAN SHOW THAT THE DEFENDANT WAS AWARE OF THE PRESUMPTION OF INNOCENCE.

"Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United States*, 527 U.S. 1, 18 (1999) (quoting Traynor, *The Riddle of Harmless Error*). "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent juris-

diction in obedience to local law, and set the guilty free." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). "[I]t is of vital importance to the system of criminal justice that guilty pleas not be lightly set aside on fanciful arguments that exalt form over substance * * *." *United States v. Akinsola*, 105 F.3d 331, 332-33 (7th Cir. 1997).

This Court's decision in *United States v. Vonn* supports the view that a flawed plea colloquy does not automatically require reversal. In *Vonn*, the pertinent rule required the court to advise the defendant of his right to counsel at a trial, but the district court had failed to give an oral advisement. The issue was "whether a defendant who lets Rule 11 error pass without objection in the trial court must carry the burdens of Rule 52(b) or whether even the silent defendant can put the Government to the burden of proving the Rule 11 error harmless." *Vonn*, 535 U.S. at 58. The *Vonn* Court concluded that "a silent defendant has the burden to satisfy the plain-error rule and that a reviewing court may consult the whole record when considering the effect of any error on substantial rights." *Id.* at 59, 73-74.

In light of *Vonn*, which recognized the applicability of harmless-error and plain-error doctrines, the Ohio Supreme Court should have followed the *Vonn* analysis and concluded that any constitutional plea-advisement error would not automatically require reversal.

The Ohio Supreme Court's ruling amounted to a determination that plea-advisement error is "structural error." But "[t]he omission of a single Rule 11 warning without more is not colorably structural." *Dominguez-Benitez*, 542 U.S. at 81 n. 6.

The omission of an oral advisement does not meet the general requirements to qualify as "structural error." Most constitutional errors can be harmless, and there is a strong presumption that constitutional error will be subject to harmless-error analysis. *Neder*, 527 U.S. at 8. "[W]e have found an error to be 'structural' and thus subject to automatic reversal, only in a 'very limited class of cases.'" *Id.* at 8, quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997). "Those cases, we have explained, contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Such errors infect the entire trial process, and necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence * * * and no criminal punishment may be regarded as fundamentally fair." *Neder*, 527 U.S. at 8-9 (citations and internal quotation marks omitted).

The omission of an oral advisement does not necessarily render the plea-taking process fundamentally unfair. The execution of a written plea of guilty can provide a reliable substitute showing that an oral advisement would have made no difference. See *Dominguez-Benitez*, 542 U.S. at 85 (plea agreement "tends to show that the Rule 11 error made no difference to the outcome here."); *Akinsola*, 105 F.3d at 334. Other proceedings in the same case could show that the defendant was already advised of the matter that would have been covered by the advisement. See, e.g., *Vonn*, 535 U.S. at 75. Other circumstances, such as undisputed or overwhelming evidence of guilt or an eagerness to accept a plea bargain, could show that an oral advisement would have had no effect on

the defendant's decision to plead guilty. See *Dominguez-Benitez*, 542 U.S. at 85 ("it is hard to see here how the warning could have had an effect on Dominguez's assessment of his strategic position.").

In the end, the absence of the advisement does not necessarily "infect" the entire plea-taking process so as to make it impossible to have a knowing, voluntary, and intelligent plea. There is no reason to make advisement error "structural" and thereby immune to all harmless-error review. Courts can address the issue on a case-by-case basis to determine whether the omission of the advisement was harmless. See *Neder*, 527 U.S. at 14.

Respondent contended in the Ohio Supreme Court that his approval of the Entry of Guilty Plea "does not demonstrate that the defendant necessarily read or understood the plea form." But courts should not be required to indulge such speculation. Respondent acknowledged that he signed the Entry and that his counsel had reviewed his constitutional rights with him. By approving the Entry, respondent was acknowledging, *inter alia*, that:

- "I have reviewed the facts and law of my case with my counsel."
- "I understand that my guilty plea to the crime specified constitutes both an admission of guilt and a waiver of any and all constitutional, statutory, or factual defenses with respect to such crime and this case."
- "I further understand that by pleading 'Guilty', I waive a number of important and substantial constitutional, statutory, and procedural rights
* * *

- *I understand* that the Court upon acceptance of my plea(s) of 'Guilty' may proceed with judgment and sentence." (Emphasis added)

Any constitutional error in failing to give an oral advisement regarding the presumption of innocence was harmless, and the Ohio Supreme Court should have so held. Instead, the Court disregarded the strict criteria for finding an error to be "structural" and imposed an unwarranted automatic-reversal rule. Certiorari review is warranted.

CONCLUSION

In light of the foregoing, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

OHIO SUPREME COURT OPINION

APPEAL from and CERTIFIED by the
Court of Appeals for Franklin County
No. 06AP-523, 2007-Ohio-1295.

THE STATE OF OHIO,
Appellant,

v.

VENEY,
Appellee.

RENDERED OCTOBER 9, 2008

MOYER, C.J.

Once again, we are asked to clarify the duties of the trial court in accepting pleas to felony charges and to determine the consequences of the trial court's failure to comply with Crim.R. 11. The first issue is what level of compliance is required of the trial court when it advises a defendant of the state's burden to prove guilt beyond a reasonable doubt at trial before accepting a plea of guilty or no contest. The second issue is whether a failure to advise the defendant of this right is subject to harmless-error review under Crim.R. 52.¹ We affirm the judgment of the court of

¹ The certified question accepted asks whether a trial court must strictly comply with the Crim.R. 11 requirement that it inform the defendant that by entering a felony plea, the

appeals, holding that trial courts must strictly comply with all parts of Crim.R. 11(C)(2)(c) in conducting plea colloquies and that a trial court's failure to inform a defendant of any right in that subsection invalidates the plea.

I. Case Background

Appellee, Thomas L. Veney, was indicted on one count of felonious assault in violation of R.C. 2903.11 and one count of kidnapping in violation of R.C. 2905.01 along with two firearm specifications as a result of a 2004 event involving his wife, Nicole. As stated by the prosecutor at the plea hearing, Veney had come home from a night of drinking on July 8, 2004, and accused Nicole of sleeping with his cousin. Veney pulled out a loaded gun while in the bedroom, held it on Nicole, and threatened to shoot her. Nicole was lying next to her seven-year-old daughter at the time. The argument eventually moved downstairs, where Veney fired a shot into the wall. Nicole then ran out of the house, and Veney followed her. Nicole saw Veney point the gun at her and heard him fire several more shots. Nicole was able to run to a nearby business to seek help. Nicole's account was corroborated by neighbors who heard the shots and saw Veney holding a gun.

defendant waives the right to have the state prove guilt beyond a reasonable doubt. We also accepted the state's discretionary appeal, which offers two related propositions of law: (1) "A substantial compliance standard applies to the advisement required by Crim.R 11(C)(2)(c) regarding the state's burden of proving guilt beyond a reasonable doubt at trial" and (2) "the failure to give the beyond-reasonable-doubt oral advisement required by Crim.R 11(C)(2)(c) is subject to harmless-error review and does not always require reversal."

Veney initially entered a not-guilty plea to all charges but later entered guilty pleas to the lesser included offense of attempted felonious assault and one firearm specification. The other count and firearm specification were dismissed. The trial court accepted the pleas, found Veney guilty, and sentenced him to two years for felonious assault and three years on the firearm specification for an aggregate prison term of five years. Veney appealed, asserting that his plea was invalid because the trial court had failed to explain the nature of the charges and failed to inform him that the state had to prove him guilty beyond a reasonable doubt at trial.

The Tenth District Court of Appeals reversed the judgment of the trial court because the trial court did not strictly comply with Crim.R. 11(C)(2)(c) when it failed to orally inform Veney that by entering a guilty plea he waived his constitutional right to have his guilt determined beyond a reasonable doubt at trial. *State v. Veney*, 10th Dist. No. 06AP-523, 2007-Ohio-1295, ¶ 16.² The court of appeals vacated the plea and remanded the case to the trial court for further proceedings. *Id.*

The court of appeals certified its judgment as being in conflict with the judgments in *State v. Scott* (1996), 113 Ohio App.3d 401, 406-407, 680 N.E.2d 1297; *State v. Cogar* (Oct. 20, 1993), Summit App. No. CA-16234, 1993 WL 413651; and *State v. Shinkle* (Aug. 18, 1998), Scioto App. No. 98CA2560, 1998 WL 546074. We accepted the certified question “[w]hether a trial court must strictly comply with the require-

² The court of appeals did not consider Veney’s claim that he had not understood the nature of his charges. *Veney*, 2007-Ohio-1295, ¶16, fn. 4.

ment in Crim.R. 11(C) that it inform the defendant that by entering a plea, the defendant waives the right to have the state prove guilt beyond a reasonable doubt." *State v. Veney*, 114 Ohio St.3d 1423, 2007-Ohio-2904, 868 N.E.2d 678. We also accepted the two propositions of the state within its discretionary appeal. 114 Ohio St.3d 1425, 2007-Ohio-2904, 868 N.E.2d 679.

In summary, the state argues that (1) the trial court need only substantially comply with the duty to advise the defendant of the state's obligation to prove the defendant guilty beyond a reasonable doubt at trial, (2) a flawed plea colloquy does not require automatic reversal, (3) Crim.R. 52 guides the court of appeals as it determines the consequences of the error being reviewed, and (4) under either a harmless-error or plain-error analysis, Veney's plea survives as a knowing, intelligent, and voluntary plea. Veney responds that the trial court's failure to orally advise him of the state's burden of proof as required by Crim.R. 11(C)(2)(c) is constitutional error affecting a substantial right that automatically invalidates his plea.

II. Legal Analysis

We have clearly stated, "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. The United States Supreme Court has held that a knowing and voluntary waiver of the right to jury trial, the right against compulsory self-incrimination, and the

right to confront one's accusers cannot be inferred from a silent record. *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. Crim.R. 11 was adopted in 1973, giving detailed instruction to trial courts on the procedure to follow when accepting pleas.

A. Crim.R. 11(C) Requirement for Plea Colloquy

Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest. With respect to the required colloquy, Crim.R. 11(C)(2) provides:

"In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

"(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

"(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

"(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for

obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c). Although the constitutional and nonconstitutional portions of this colloquy are categorized separately, we have not always distinguished between the two when examining the adequacy of the court's colloquy with a defendant. In *State v. Caudill* (1976), 48 Ohio St.2d 342, 346, 2 O.O.3d 467, 358 N.E.2d 601, we noted that the provisions of Crim.R. 11(C) must "be scrupulously and literally heeded." Two standards have developed, however, depending upon which type of right is alleged to have been the subject of the court's error in advising the defendant.

*B. Substantial Compliance with
Crim.R. 11(C)(2)(a) and (b)*

Although we had initially insisted on strict compliance with Crim.R. 11(C), we began to draw a distinction between the notification of constitutional rights and the other information required to be in the colloquy in *State v. Stewart* (1977), 51 Ohio St.2d 86, 5 O.O.3d 52, 364 N.E.2d 1163. In *Stewart*, we held that with respect to the nonconstitutional notifications required by Crim.R. 11(C)(2)(a) and 11(C)(2)(b), substantial compliance is sufficient. *Id.*

Ohio's substantial-compliance standard was further developed in *State v. Strawther* (1978), 56 Ohio

St.2d 298, 10 O.O.3d 420, 383 N.E.2d 900; *State v. Billups* (1979), 57 Ohio St.2d 31, 11 O.O.3d 150, 385 N.E.2d 1308; *State v. Ballard* (1981), 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115; and *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. We explained: "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect." (Citations omitted.) *Id.* at 108, 564 N.E.2d 474. To demonstrate prejudice in this context, the defendant must show that the plea would otherwise not have been entered. *Id.*

We have also clarified that in reviewing the totality of the circumstances, a court must determine whether the defendant understood the consequences of waiver. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. Because (1) Griggs had confessed and had signed a written guilty-plea form and (2) Griggs and his counsel assured the court that he was aware of the rights he was waiving, we determined that the trial court had substantially complied with Crim.R. 11, even though the trial court did not orally advise Griggs that accepting the plea was a complete admission of guilt. *Id.* at 16, 19.

Our precedent, therefore, establishes that a defendant must show prejudice before a plea will be vacated for a trial court's error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue.

C. Strict Compliance with Crim.R. 11(C)(2)
(c)—Notification of Constitutional Rights

Despite the evolution of substantial compliance as a standard for the court's nonconstitutional notifications and determinations required by Crim.R. 11(C)(2)(a) and (b), the same is not true for the constitutional rights within Crim.R. 11(C)(2)(c). In *Ballard*, we reaffirmed *Caudill's* holding that strict, or literal, compliance was required when constitutional rights are involved. 66 Ohio St.2d at 479, 20 O.O.3d 397, 423 N.E.2d 115. Noting that the preferred procedure is for the trial court to use the language in Crim.R. 11(C), we also stated, "However, failure to [literally comply] will not necessarily invalidate a plea. The underlying purpose, from the defendant's perspective, of Crim.R. 11(C) is to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty." *Id.* at 479-480, 20 O.O.3d 397, 423 N.E.2d 115.

Crim.R. 11(C)(2)(c) requires that the defendant be advised of the right to a jury trial, the right to confront one's accusers, the privilege against compulsory self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt. The first three are the three constitutional rights originally identified in *Boykin v. Alabama*, 395 U.S. at 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. We recognized notification of the right of compulsory process to obtain witnesses as a fourth constitutional right in *Ballard*. 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, at paragraph one of the syllabus.

Although the right to be proven guilty by the state beyond a reasonable doubt is one of the five rights

included within Crim.R. 11(C)(2)(c), we have never expressly accorded it the same stature as the other four. In fact, in a footnote we suggested that the explanation of the prosecution's burden of proof should be treated differently, subject to a standard of substantial, rather than strict, compliance. *State v. Sturm* (1981), 66 Ohio St.2d 483, 484, 20 O.O.3d 403, 422 N.E.2d 853, fn. 2. Because of this, the state argues that a trial court need only substantially comply with the obligation to advise a defendant of the prosecution's burden of proof because the right is not specified in *Boykin* as one that is constitutionally required.

Yet, as the United States Supreme Court held the year after *Boykin*, the right to have the state prove guilt beyond a reasonable doubt is a constitutionally protected right of an accused. *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368. We therefore reject the state's contention and instead hold that the duty to advise the defendant of the right to have guilt proven by the state beyond a reasonable doubt is among the duties of Crim.R. 11(C)(2)(c) with which the court must strictly comply.

D. Consequences of the Court's Failure to Strictly Comply

Having found that a court must strictly comply with Crim.R. 11(C)(2)(c) when advising a defendant of all five constitutional rights listed, we answer the certified question in the affirmative. Our answer to the certified question does not, however, address the consequences of the court's failure to comply. The state maintains that even if the trial court must strictly comply with Crim.R. 11(C)(2)(c) by informing Veney of the prosecution's burden of proof beyond

reasonable doubt, the court's error need not automatically lead to vacation of the conviction and plea. We disagree.

To properly frame this issue, we must review *Ballard*, which marked the first time that we explicitly made the connection between the strict compliance standard and the constitutional rights in Crim.R. 11(C)(2)(c); it provides valuable insight into how the standard works in practice.

In *Ballard*, we cited *Boykin v. Alabama* (1969), 395 U.S. 238, 242–243, 89 S.Ct. 1709, 23 L.Ed.2d 274, for the principles that a defendant must be apprised of certain constitutional rights³ before his or her plea may be considered intelligent and voluntary and that plain error results when a trial court fails to explain those rights. *Ballard*, 66 Ohio St.2d at 476–477, 20 O.O.3d 397, 423 N.E.2d 115.

However, we found a split of authority on the issue of “whether the complete omission of a *Boykin* constitutional right alone is cause to nullify a guilty plea.” *Ballard* at 477, 20 O.O.3d 397, 423 N.E.2d 115. Some courts held that the “failure to mention, in any manner, a *Boykin* right does not necessarily result in an involuntary and unknowing guilty plea”; others “held that for a guilty plea to be voluntarily and intelligently entered, the defendant must be informed that he is waiving his *Boykin* rights.” *Id.* at 477–478, 20 O.O.3d 397, 423 N.E.2d 115.

We adopted the latter view: “[A] guilty plea is *constitutionally infirm* when the defendant is not in-

³ In view of our holding in this case, the principles applicable to the “*Boykin* rights” extend to all five rights listed in Crim.R. 11(C)(2)(c) in Ohio.

formed in a reasonable manner at the time of entering his guilty plea of his [*Boykin* rights]." (Emphasis added.) *Ballard* at 478, 20 O.O.3d 397, 423 N.E.2d 115. We then crystallized this concept in the syllabus with unarguably mandatory language: "Prior to accepting a guilty plea from a criminal defendant, *the trial court must inform the defendant that he is waiving his [Boykin rights].*" (Emphasis added.) *Id.* at paragraph one of the syllabus.

This requirement is tempered only slightly by the second paragraph of the syllabus: "Failure to use the exact language contained in Crim.R. 11(C), in informing a criminal defendant of his [*Boykin* rights], is not grounds for vacating a plea *as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant.*" (Emphasis added.) *Ballard* at 473, 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, at paragraph two of the syllabus, modifying *State v. Caudill* (1976), 48 Ohio St.2d 342, 346, 2 O.O.3d 467, 358 N.E.2d 601. With that holding, we recognized that a trial court can still convey the requisite information on constitutional rights to the defendant even when the court does not provide a word-for-word recitation of the criminal rule, so long as the trial court actually explains the rights to the defendant.

We look to the record to determine whether a trial court strictly complied with this duty. *Id.* at 481, 20 O.O.3d 397, 423 N.E.2d 115. Following this rule, we upheld *Ballard's* plea even though the trial court failed to specifically mention the right to a jury trial by name, because the trial court did inform *Ballard* that "neither the Judge nor the jury" could draw any inference if *Ballard* refused to testify and that he "was entitled to a completely fair and impartial trial

under the law.” Id. at 479, 481, 20 O.O.3d 397, 423 N.E.2d 115, fn. 7.

Thus, pursuant to the strict-compliance standard set forth in *Ballard*, the trial court must orally inform the defendant of the rights set forth in Crim.R. 11(C)(2)(c) during the plea colloquy for the plea to be valid. Although the trial court may vary slightly from the literal wording of the rule in the colloquy, the court cannot simply rely on other sources to convey these rights to the defendant. “We cannot presume a waiver of these * * * important federal rights from a silent record.” *Boykin*, 395 U.S. at 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. When the record confirms that the trial court failed to perform this duty, the defendant’s plea is constitutionally infirm, making it presumptively invalid. See *Ballard*, 66 Ohio St.2d at 481, 20 O.O.3d 397, 423 N.E.2d 115; *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12.

In the present case, it is undisputed that the trial court plainly failed to orally inform Veney of his constitutional right to require the state to prove his guilt beyond a reasonable doubt. This failure to strictly comply with Crim.R. 11(C)(2)(c) renders Veney’s plea invalid. We therefore affirm the holding of court of appeals in this regard and remand the matter to the trial court for further proceedings.

III. Conclusion

We hold that a trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one’s accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove

guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid.

We answer yes to the certified question and agree with the court of appeals that the trial court must strictly comply with Crim.R. 11 in advising a defendant of constitutional rights. Because the trial court did not inform Veney that he had a right to be found guilty only upon proof beyond a reasonable doubt, it failed to strictly comply with Crim.R. 11(C)(2)(c), and his plea is therefore invalid.

Judgment affirmed and cause remanded.

PFEIFER, O'CONNOR, and O'DONNELL, JJ., concur.

LUNDBERG STRATTON, LANZINGER, and CUPP, JJ., concur in part and dissent in part.

LANZINGER, J., concurring in part and dissenting in part.

I agree with the portion of the syllabus that mandates that trial courts when conducting plea colloquies must strictly comply with all parts of Crim.R. 11(C)(2)(c), including informing defendants of the right to be found guilty only upon proof beyond a reasonable doubt; I disagree with the portion of the syllabus that addresses the consequence of lack of strict compliance. I respectfully dissent from the majority's holding that a trial court's failure to strictly comply with Crim.R. 11(C)(2)(c) requires vacation of the plea and conviction without regard to contrary evidence in the record that the plea was entered knowingly and voluntarily despite the trial court's omission.

We have held that when a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no-contest plea is invalid “under a presumption that it was entered involuntarily and unknowingly.” (Emphasis added.) *State v. Griggs*, 103 Ohio St.3d 85, 2004- Ohio-4415, 814 N.E.2d 51, ¶ 12; see also *State v. Nero* (1990), 56 Ohio St.3d 106, 107, 564 N.E.2d 474, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 242–243, 89 S.Ct. 1709, 23 L.Ed.2d 274. This court has never held, until today, that this presumption is irrebuttable or that a plea must be vacated automatically when the trial court fails to orally explain a constitutional right.

Interpreting Crim.R. 11(C)(2)(c) as an absolute rule for which imperfect compliance should lead to automatic vacation of a plea in every case, the majority cites *State v. Ballard* (1981), 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115. But the majority’s reasoning seems to conflate a single missing oral advisement with the entirely “silent record” referred to *Boykin*. *Ballard*, however, did not foreclose an opportunity for the state to show that there was not a silent record with respect to *Boykin* rights. Just as the state is allowed to rebut the presumption that a warrantless search is unreasonable, the state should be able to rebut the presumption that a plea is involuntary and unknowing when a judge fails to mention one of the constitutional rights in Crim.R. 11(C)(2)(c).

Allowing the state the chance to rebut the presumption that a defendant has been prejudiced does not confuse the standards of strict compliance and substantial compliance. The majority recognizes that under the substantial compliance standard, the burden is on the *defendant* to show prejudice, which

means showing that the plea would otherwise not have been entered. *Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474. A requirement that the *state* must overcome a presumption of the plea's invalidity when the trial court does not strictly comply with Crim.R. 11(C)(2)(c) means that the defendant need no longer show prejudice. The state simply is given an opportunity to establish through other evidence in the record that the defendant's plea was still knowing and voluntary.

Moreover, federal law does not require automatic vacation of a plea when a judge fails to inform a defendant of a *Boykin* right. See *United States v. Vonn* (2002), 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90. Instead, the court reviews the entire record—including written pleas and statements that constitutional rights were reviewed with counsel—to determine whether the defendant understood and voluntarily made the plea. *Id.* at 74-75. We have previously adopted this rule in *Ballard*, acknowledging that when determining whether a defendant was adequately informed of his constitutional rights under Crim.R. 11, a court must review the entire record and not just determine whether the judge recited the exact language in the rule. 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, paragraph two of the syllabus.

To the contrary, the majority opinion now concludes that strict compliance brooks no mistakes by the trial court in its oral recitation to the defendant. In its overly formalistic view of the consequences of failure to strictly comply with Crim.R. 11(C)(2)(c), the majority rejects the idea that a trial court may have informed a defendant of his or her constitutional rights in a number of ways, including written mate-

rials that have been reviewed with counsel and signed and assented to in open court. The trial court's overriding obligation has been to ensure that a plea is entered in a knowing and intelligent manner. *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. But now, the majority's holding will invalidate convictions based upon a single omitted oral statement of the trial court, no matter whether the record would otherwise show that the defendant understood and appreciated all constitutional rights being waived.

Because I disagree with these draconian consequences as applied to every case, I respectfully dissent. I would hold that the state should have an opportunity to rebut the presumption that a plea is unknowing and involuntary with evidence from the entire record.

LUNDBERG STRATTON and CUPP, JJ., concur in the foregoing opinion.

Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, for appellant.

Yeura R. Venters, Franklin County Public Defender, and John W. Keeling, Assistant Public Defender, for appellee.

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APPENDIX B

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 06AP-523

STATE OF OHIO,
Plaintiff-Appellee,

v.

THOMAS L. VENNEY,
Defendant-Appellant.

RENDERED ON MARCH 22, 2007

APPEAL from the Franklin County
Court of Common Pleas.

KLATT, J.

Defendant-appellant, Thomas L. Veney, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. Because the trial court did not comply with Crim.R. 11(C) when it accepted appellant's guilty plea, we vacate that judgment and remand the matter for further proceedings.

On July 16, 2004, a Franklin County Grand Jury indicted appellant for one count of felonious assault in violation of R.C. 2903.11 and one count of kidnapping in violation of R.C. 2905.01.

Both counts contained firearm specifications pursuant to R.C. 2941.141 and R.C. 2941.145. The charges arose out of a domestic altercation between appellant and his wife. Appellant initially entered a not guilty plea to the charges but subsequently entered a guilty plea to the lesser included offense of attempted felonious assault in violation of R.C. 2923.02 as it relates to R.C. 2903.11, and one firearm specification.¹ The trial court accepted appellant's guilty plea, found him guilty, and sentenced him accordingly.

Appellant appeals and assigns the following error:

THE TRIAL COURT ERRED WHEN IT FAILED TO COMPLY WITH CRIM.R. 11 BY INFORMING THE DEFENDANT THAT THE STATE WAS REQUIRED TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT AND BY FAILING TO PROPERLY ASCERTAIN THAT THE DEFENDANT UNDERSTOOD THE NATURE OF THE CHARGE AGAINST HIM.

In his lone assignment of error, appellant contends that the trial court did not comply with Crim.R. 11(C) when it failed to inform him that by entering a guilty plea, he waived his constitutional right to have his guilt determined under a "beyond a reasonable doubt standard" at trial. We agree.

Crim.R. 11(C) governs the procedure that a trial court must follow before accepting a guilty plea. Crim.R. 11(C)(2) provides:

In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall

¹ The trial court dismissed the remaining charges and specifications.

not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

A trial court need only substantially comply with the non-constitutional requirements contained in Crim.R. 11(C)(2)(a) and (b). *State v. Thomas*, Franklin App. No. 04AP-866, 2005-Ohio-2389, at ¶10. Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the

rights he is waiving. *Id.*, quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

Although substantial compliance is sufficient for the non-constitutional requirements set forth in Crim.R. 11(C)(2)(a) and (b), a trial court must strictly comply with the critical constitutional requirements referenced in Crim.R. 11(C)(2)(c). *State v. Carter*, Franklin App. No. 02AP-294, 2002-Ohio-6967, at ¶11, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus. Although strict compliance is required, a trial court is not required to use the exact language contained in Crim.R. 11(C)(2)(c). The trial court must explain the constitutional rights that a defendant waives by pleading guilty in a manner reasonably intelligible to the defendant. *Ballard*, paragraph two of the syllabus; *State v. Anderson* (1995), 108 Ohio App.3d 5, 11; *Carter*. What constitutes the critical constitutional requirements in Crim.R. 11(C)(2)(c) lies at the heart of the issue presented in the case at bar.

It is undisputed that the trial court failed to inform appellant that by entering a guilty plea he waived his constitutional right to have his guilt determined under a "beyond a reasonable doubt" standard, a right listed in Crim.R. 11(C)(2)(c). The state contends, however, that the trial court must only substantially comply with the requirement that it inform appellant of this constitutional right, and that it did so when appellant signed a guilty plea form indicating that he waived this right. We disagree.

In *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, the United States Supreme Court held that before accepting a guilty plea, a trial court must inform a criminal defendant of the constitutional rights he waives by entering a guilty plea. *Id.* at 243.

The rights identified in *Boykin* were: (1) the privilege against compulsory selfincrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. *Id.* These three constitutional rights are among those listed in Crim.R. 11 (C)(2)(c). Therefore, a trial court must strictly comply with the requirement that it inform a defendant of these constitutional rights prior to accepting a guilty plea. *Ballard*.

The right to have the state prove guilt beyond a reasonable doubt is a constitutionally-protected right of a criminal defendant. See *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068; *State v. Higgs* (1997), 123 Ohio App.3d 400, 406; *Beachwood v. Barnes* (Oct. 25, 2001), Cuyahoga App. No. 78841 (O'Donnell, J., concurring). At the time *Boykin* was decided, there was apparently some question regarding whether the reasonable doubt standard was a constitutional right. See *Winship*; see, also, *State v. Scott* (1996), 113 Ohio App.3d 401, 406 (stating that reasonable doubt standard was a statutory right). The Court in *Winship*, however, made it clear that the standard was constitutionally based. *Id.* at 364. ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt * * *"). The Court decided *Winship* one year after it decided *Boykin*. If *Winship* had been decided before *Boykin*, it is possible that the constitutional right to have guilt proven beyond a reasonable doubt may have been included in the *Boykin* rights. See *Barfell v. State* (Ind.App.1979), 399 N.E.2d 377, fn. 11. In fact, the author of the *Boykin* opinion later wrote that the right to have guilt proved beyond a reasonable doubt is also involved when a defendant enters a guilty plea. *John-*

son v. Ohio (1974), 419 U.S. 924, 926, 95 S.Ct. 200 (Douglas, J., dissenting) (the three constitutional rights identified in *Boykin* were illustrative and not exhaustive). See, also, *State v. Mallon* (Dec. 17, 1999), Trumbull App. No. 98-T-0032 (noting that the list of constitutional rights in *Boykin* were illustrative, not exhaustive).

In *Ballard*, the Supreme Court of Ohio added a fourth constitutional right that must be strictly explained to a defendant entering a guilty plea: the right to compulsory process. *Id.* at paragraph one of the syllabus. This constitutional right is the fourth of the five constitutional rights listed in Crim.R. 11(C)(2)(c). The *Ballard* court noted that the constitutional right to compulsory process was not named in *Boykin* as a right that a trial court must explain to a defendant. The court, however, reasoned that because the right to compulsory process was a trial right guaranteed by the United States Constitution, just like the trial rights named in *Boykin*, a trial court must also inform a defendant of that constitutional right prior to accepting a guilty plea, notwithstanding the fact that it was not identified in *Boykin*. *Id.* at fn. 4. It is well-established that a state court may provide more constitutional safeguards than federal courts. *Higgs*, at 406, citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, paragraph one of the syllabus.

On the same day the Supreme Court of Ohio decided *Ballard*, it also decided *State v. Sturm* (1981), 66 Ohio St.2d 483. *Sturm* also involved a trial court's obligation pursuant to Crim.R. 11 to advise a criminal defendant of constitutional rights waived by a guilty plea. In that case, the court held that the trial court failed to inform Sturm of his constitutional

right to confront his accusers, a right expressly identified in *Boykin*. Therefore, the court vacated Sturm's plea and remanded the case.

In a footnote, however, the court noted that Sturm also argued that his plea should be vacated because the trial court failed to inform him of his right to have his guilt determined under a beyond a reasonable doubt standard. *Id.* at fn. 2. Although not the basis of the court's decision, the court stated that "[w]hile a trial court is required by Crim.R. 11(C) to inform a defendant of this right, it is not required by [Boykin]". *Id.* Thus, the court reasoned, because *Boykin* did not mention the constitutional right to have guilt proven beyond a reasonable doubt, a trial court would only have to substantially comply with that requirement. *Id.*, citing *State v. Stewart* (1977), 51 Ohio St.2d 86 (requiring only substantial compliance with non-constitutional requirements of Crim.R. 11).

The reasoning expressed in footnote two of *Sturm*, while only dicta, is inconsistent with the rationale underlying the *Boykin* and *Ballard* decisions. Crim.R. 11(C)(2)(c) identifies five constitutional rights of which a trial court must inform a defendant before accepting a guilty plea. *Ballard* expressly requires a trial court to strictly explain four of these constitutional rights to a defendant before accepting a guilty plea, notwithstanding the fact that *Boykin* did not expressly identify all four of these constitutional rights. We see no rational basis for treating a defendant's constitutional right to have his or her guilt determined under a beyond a reasonable doubt standard any differently.

Accordingly, we hold that a trial court must strictly comply with the constitutional requirements in

Crim.R. 11(C)(2)(c) and explain all of the constitutional rights listed in the rule that a defendant waives by pleading guilty in a manner reasonably intelligible to the defendant, including the right to have the state prove guilt beyond a reasonable doubt. *Higgs*.² Other courts have reached the same conclusion. See *State v. Green*, Mahoning App. No. 02CA-217, 2004-Ohio-6371, at ¶11; *State v. Senich*, Cuyahoga App. No. 82581, 2003-Ohio-5082, at ¶27; *Mallon*, supra; *State v. Givens* (Sept. 16, 1982), Montgomery App. No. 7774.³

In this case, the trial court failed to inform appellant of his right to have his guilt determined under a beyond a reasonable doubt standard. Thus, the trial court did not strictly comply with the constitutional requirements of Crim.R. 11(C)(2)(c) when it accepted

² For the reasons previously stated, we disagree with this court's analysis in *State v. Ellis* (June 20, 1996), Franklin App. No. 95APA10-1399. In that case, this court considered whether the trial court informed a defendant of the right to have guilt proven beyond a reasonable doubt. This court, citing *Sturm*, simply questioned whether the right was identified in *Boykin*, and because it was not, required a trial court to substantially comply with the rule. Identification of a right in *Boykin* is not sufficient, per *Ballard*, to determine a trial court's obligations pursuant to Crim.R. 11(C)(2)(c). See, also, *State v. Hines* (May 23, 1995), Franklin App. No. 94APA10-1428 (requiring substantial compliance).

³ Other courts only require substantial compliance with the requirement that a defendant be advised of the right to have the state prove guilt beyond a reasonable doubt. See *State v. Cogar* (Oct. 20, 1993), Summit App. No. CA-16234; *State v. Shinkle* (Aug. 18, 1998), Scioto App. No. 98CA2560; *Scott*, supra, at 406-407.

appellant's guilty plea.⁴ Appellant's lone assignment of error is sustained, and the judgment of the Franklin County Court of Common Pleas is vacated. The matter is remanded to the trial court for further proceedings.

Judgment vacated and cause remanded.

PETREE, J., concurs.

SADLER, P.J., dissents.

SADLER, P.J., dissenting.

I do not minimize the importance of informing a defendant of the state's burden of proving guilt beyond a reasonable doubt. Clearly, if appellant had not been informed of that burden at all during his sentencing, vacation of his guilty plea would be required, but that is not the case here. I disagree with the majority's conclusion that the trial court was required to strictly comply with Crim.R. 11 regarding the state's burden, and would instead apply the test of substantial compliance to this case.

Neither the United States Supreme Court after its decision in *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274; nor the Ohio Supreme Court after its decision in *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, has taken the opportunity to expand the list of critical constitutional rights requiring strict adherence to Crim.R. 11(C) to include the right to require the state to prove guilt beyond a reasonable doubt. In fact, the Ohio Supreme Court, albeit speaking by way of a footnote, has stated that a court's communication of the right to have the state prove guilt beyond a reasonable doubt

⁴ Because of this determination, appellant's claim that he did not understand the nature of the charges when he entered his guilty plea is moot. App.R. 12.

is not subject to strict compliance with Crim.R. 11 under *Boykin*. *State v. Sturm* (1981), 66 Ohio St.2d 483, 422 N.E.2d 853, at fn. 2.

Moreover, we have held in two cases that a trial court's failure to strictly comply with Crim.R. 11 by informing a defendant of the right to have guilt proven beyond a reasonable doubt does not establish that the defendant's guilty plea was not entered knowingly, intelligently, and voluntarily, thus applying a substantial compliance test to a trial court's compliance with this requirement. *State v. Ellis* (June 20, 1996), Franklin App. No. 95AP10-1399, LEXIS 2522; *State v. Hines* (May 23, 1995), Franklin App. No. 94APA10-1428, LEXIS 2175.

For those portions of Crim.R. 11 to which the substantial compliance test applies, the proper method for analyzing the issue is whether, under the totality of the circumstances, the defendant properly understood the charges and the rights he was waiving, and whether the defendant suffered any prejudice from the trial court's omission specifically informing appellant of the right to have guilt proven beyond a reasonable doubt. In this case, the plea form appellant signed did identify the right to have guilt proven beyond a reasonable doubt as one of the rights appellant was waiving by signing the form. The record shows that the trial court asked appellant if he had read the form and discussed it with his attorney, and that appellant indicated he understood the rights he was waiving. I believe this was sufficient to establish that appellant's plea was made knowingly, intelligently, and voluntarily.

Since I cannot join the majority's conclusion that appellant's plea was rendered involuntary by the procedure followed by the trial court in his sentencing, I respectfully dissent.

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APPENDIX C

THE SUPREME COURT OF OHIO

Case No. 2007-0656

STATE OF OHIO

v.

THOMAS L VENEY

RECONSIDERATION ENTRY

Franklin County

Filed December 3, 2008

Upon consideration of appellant's expedited motion for stay of the Court's judgment and motion for reconsideration,

It is ordered by the Court that the motions are denied.

(Franklin County Court of Appeals; No. 06AP523)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

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APPENDIX D

THE SUPREME COURT OF OHIO

Case No. 2007-0657

STATE OF OHIO

v.

THOMAS L. VENEY

RECONSIDERATION ENTRY

Franklin County
Filed December 3, 2008

Upon consideration of appellant's expedited motion for stay of the Court's judgment and motion for reconsideration,

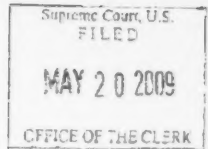
It is ordered by the Court that the motions are denied.

(Franklin County Court of Appeals; No. 06AP523)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

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No. 08-1018



In The

Supreme Court of the United States

The State of Ohio,
Petitioner,

v.

Thomas L. Veney,
Respondent.

On Petition for Writ of Certiorari to the

Supreme Court of Ohio

**BRIEF FOR THE RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Yvonne R. Venters
Franklin County Public Defender

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Counsel for Respondent

QUESTIONS PRESENTED

The respondent takes issue with petitioner's list of questions presented. It is the respondent's position that no constitutional questions are presented. This is not a case, as suggested by petitioner, dealing with whether or not *Boykin v. Alabama*, 395 U.S. 238 (1969), requires trial courts to provide specific oral advisements and to obtain specific waivers regarding constitutional rights waived by entering guilty pleas. This is a case dealing with the enforcement of an Ohio law that requires the trial courts to personally address and inform the defendants of these rights and to determine that the defendants understand them. As such, no constitutional questions whatsoever are presented herein.

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<i>Dickerson v. United States</i> , 530 U.S. 428, 429, 120 S.Ct. 2326, 147 L.Ed.2d 405, (2000)	5
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¹ Yocum, 'Starting Over' Not Easy after Wrongful Conviction, Columbus Dispatch, December 21, 1986, § E at 2.	3

THIS COURT HAS NO JURISDICTION

The respondent takes issues with the petitioner's claim that this Court has jurisdiction to hear the issues presented by this case. This case represents nothing more than the Ohio Supreme Court exercising its supervisory power over the lower courts by enforcing a rule promulgated by the Ohio Supreme Court governing the procedure the trial courts must follow when accepting pleas in criminal cases. Ohio has a rule of procedure that requires courts to inform defendants of certain constitutional rights they are waiving by pleading guilty. The Ohio Supreme Court held that the trial courts must comply with this rule. Neither the rule nor its enforcement offends any constitutional provisions.

Until 1968, when the Modern Courts Amendment to the Ohio Constitution was adopted, Ohio court procedure was governed entirely by statute and case law. The Modern Courts Amendment required the Ohio Supreme Court to "prescribe rules governing the practice and procedure in all courts of the state." Pursuant to Ohio Constitution Article IV, §5(B), the Ohio Supreme Court promulgated the Ohio Rules of Criminal Procedure "to be followed in all courts of this state in the exercise of criminal jurisdiction." The rules "shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay." Sec. Ohio Crim.R. 1.

This case called into question the construction and application of one of the criminal rules the Ohio Supreme Court promulgated and is also obligated to

enforce. Ohio Crim.R. 11(C)(2) sets forth the following pertinent guidelines for guilty pleas in felony cases:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

* * *

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself. [Bold emphasis added]

The Ohio Supreme Court took this case because of conflict and confusion among the lower courts on how this provision should be enforced. Some courts had held that Crim.R. 11(C)(2)(c) had to be strictly complied with because it dealt with informing the defendant of constitutional rights. Other courts had held that strict compliance was only required while informing defendants of certain constitutional rights but that only substantial compliance was required with respect to the obligation to inform the accused that he was waiving his right to have the state prove his guilt beyond a reasonable doubt.

In Ohio, strict compliance does not mean that the exact words of the rule must be used. It means that the record must show that the trial court explained these rights in a manner reasonably intelligent to the defendant. *State v. Veney*, 120 Ohio St 3d 176, (2008) at ¶27, ¶29. Substantial compliance is a doctrine relied

upon in Ohio to excuse the state when it does not comply with the law. Substantial compliance is not a defense available to criminal defendants; it is a defense available to the state when the state fails to follow the very laws and rules that it created and is charged with enforcing. It is a euphemism for the "close enough for government work" standard. Substantial compliance means that the trial court does not have to actually follow the rules and actually address and inform the defendant of the rights as required by the rule. It is enough that a reviewing court can speculate from the totality of the circumstances that the defendant understood the rights that the trial court neglected to inform him of. [Id. at ¶15-16.]

The Ohio Supreme Court ruled in this case that:

{¶ 31} We hold that a trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid.

Thus this is a case where the Ohio Supreme Court, in its supervisory power over the courts in Ohio, was called upon to interpret and enforce a rule of procedure that it had properly promulgated. The Ohio Supreme Court held that the trial court had to comply with the rule as it was written. The Ohio Supreme Court has the jurisdiction and power to supervise the state courts of Ohio. This Court does not hold such power and has never sought to exercise supervisory power over the state courts in this manner. The only time that this Court intervenes is if the state

courts are enforcing rules of procedure that are repugnant to the Constitution or federal laws.

Thus the basic jurisdictional question presented by the ruling herein is very simple. The state is challenging the decision by the Ohio Supreme Court that the trial courts must actually comply with a state rule of procedure that requires trial judges to personally address defendants and inform them that by pleading guilty they are waiving certain constitutional rights, including the right to have the state prove their guilt beyond a reasonable doubt. How is such a decision repugnant to the Constitution and what constitutional rights does such a holding violate? Obviously states are free to adopt rules of procedure that are broader than those required by the Constitution and they are also free to adopt rules that are of no constitutional significance. This Court's jurisdiction can be invoked only if such rules or laws, or the enforcement thereof, are repugnant to the Constitution.

The Ohio Supreme Court's ruling did not offend any constitutional rights of the defendant. Thus the question remaining is what constitutional rights of the state were offended by this ruling. The state has no constitutional right for the trial court to ignore the plain meaning of a rule of law. There is no constitutional right of the state to coerce guilty pleas by keeping criminal defendant as uninformed of their legal rights as possible. Even if a state rule or law provides protection beyond that required by the Constitution, the state cannot complain about such a rule unless the rule actually violates the Constitution.

In *Dickerson v. United States*, 530 U.S. 428, 429, 120 S.Ct. 2326, 147 L.Ed.2d 405, (2000), this Court held that it "does not hold supervisory power over the state courts, *** as to which its authority is limited to enforcing the commands of the Constitution***." In *Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940, 71 L.Ed.2d 78, (1982), this Court held:

"Before a federal court may overturn a conviction resulting from a state trial...it must be established not merely that the [State's action] is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."

Absent such a constitutional violation, it was error for the lower courts in this case to order a new trial. Even if the Court of Appeals believed, as the respondent contends, that prosecutorial misbehavior would "reign unchecked" unless a new trial was ordered, it had no authority to act as it did. Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. *Chandler v. Florida*, 449 U.S., at 570, 582-583; *Cupp v. Naughten*, *supra*, at 146. No such wrongs occurred here. Accordingly, the judgment of the Court of Appeals is Reversed.

Likewise in *Dawud Majid Mu'min v. Virginia*, 500 U.S. 415, 422, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991), this Court stated:

Our cases dealing with the requirements of voir dire are of two kinds; those that were tried in federal courts, and are therefore subject to this Court's supervisory power, [citations omitted] and those that were tried in state courts, with respect to which our authority is limited to enforcing the commands of the United States Constitution. See *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); and *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973).

This Court has no jurisdiction to review state rules or laws under the claim that such laws provide protections greater than those provided by the United States Constitution. States, of course, are free to enact such laws. This Court has jurisdiction to intervene only to correct wrongs of constitutional dimension. This Court has no jurisdiction to tell the state courts how it should enforce its procedural rules as long as the enforcement does not violate any constitutional prohibitions. There are no constitutional prohibitions against a state court enforcing a rule that requires trial courts to advise a defendant that a guilty plea waives his right to have the state prove his guilt beyond a reasonable doubt. The enforcement of such a rule is not repugnant to the Constitution. In fact, many would conclude that such a rule is very respectful of the Constitution.

The petitioner claims that the constitutional provision involved in this case is the Due Process Clause of the Fourteenth Amendment which provides "nor shall any state deprive any person of life, liberty, or property, without due process of law ***." (See, Petition for Writ of Certiorari, Constitutional Provision Involved, p. 9). The Ohio Supreme Court's ruling did nothing to violate the Due Process Clause. The petitioner's complaint is not that the Ohio Supreme Court denied anyone due process of law but that it provided too much due process. This case hinges upon the enforcement of a state rule of procedure and this court has no jurisdiction to intervene unless the enforcement violated a constitutional provision. It did not.

Constitutional Provisions and Ohio Rules Involved in the Case

The Petitioner claims that its due process rights were violated but respondent takes issue with this claim. There are no due process rights that allow trial judges to ignore a rule of law requiring them to inform a defendant of the rights that are waived by a guilty plea. The state has no due process rights to keep a defendant uninformed of rights when a state law specifically provides that defendants must be informed of these rights.

This case only involves the enforcement of Rule 9(C) of the Ohio Rules of Criminal Procedure. The rule is set forth in the appendix at page A-1.

STATEMENT OF THE CASE

The respondent pled guilty to a charge of attempted felonious assault with a firearm specification. The prosecutor indicated that the respondent had confronted his wife and accused her of sleeping with his cousin. The prosecutor claimed that the respondent got a loaded gun and threatened to shoot her. The state indicated that the couple then left the bedroom and went downstairs where the respondent fired a shot into the wall. The respondent's wife then ran out of the house and heard several more shots. The respondent's wife was not actually shot during this encounter and, according to the prosecutor, the respondent's wife wanted him released from custody but based upon the seriousness of the charge the prosecutor was only willing to agree to the stated reduction of the charge.

The respondent was sentenced to two years of imprisonment with an additional three years for the firearm specification for an aggregate prison term of five years. He later filed an appeal from this judgment and the Court of Appeals

reversed his conviction on the grounds that the trial court had failed to advise the defendant of the state's obligation to prove his guilt beyond a reasonable doubt as required by Ohio law. The Court of Appeals further certified the case to the Ohio Supreme Court as a conflict since there was a dispute among the appellate districts of Ohio as to whether or not strict or substantial compliance to this rule was required.

The Ohio Supreme Court accepted the case as a conflict and ruled that the trial judges must strictly comply with the requirements in Crim.R. 11(C)(2)(c) and must explain all of the rights listed in the rule that a defendant waives by pleading guilty, in a manner reasonably intelligible to the defendant, including the right to have the state prove guilt beyond a reasonable doubt. The State of Ohio is now arguing that this ruling somehow violates the state's right to due process of law.

ARGUMENT

PURSUANT TO A DULY PROMULGATED OHIO RULE OF PROCEDURE, TRIAL COURTS, BEFORE ACCEPTING A GUILTY PLEA, MUST PERSONALLY ADDRESS THE DEFENDANT AND INFORM HIM THAT BY ENTERING THE PLEA THE DEFENDANT IS WAIVING HIS RIGHT TO REQUIRE THE STATE TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT. THE TRIAL COURT MUST FURTHER DETERMINE THAT THE DEFENDANT UNDERSTANDS THIS ADMONITION. WHETHER OR NOT THE DUE PROCESS STANDARD OF ROYKIN V. ALABAMA REQUIRES SUCH AN ORAL ADVISEMENT IS IMMATERIAL TO THIS CASE BECAUSE OHIO LAW EXPRESSLY REQUIRES IT.

Guilty plea proceedings are crucial to the administration of justice. Most convictions are obtained through guilty or no contest pleas. Generally, at least 95% of felony convictions are obtained through such pleas.¹ In misdemeanor cases the percentage is even higher and approaches 99% in many municipal court systems. Since approximately nineteen out of every twenty felony convictions are obtained by pleas instead of trials, the criminal justice system has a vested interest in making sure that the plea process is conducted as fairly as possible.

There are those who evince little concern about the fairness of guilty plea proceedings because, after all, if the person pled guilty how unfair could any resulting conviction be? These folks are also likely to be people with little understanding of the pressure that the criminal justice system brings to bear upon innocent people to plead guilty and upon guilty people, who have been overcharged, to plead to offenses greater than were actually committed.

Some studies dealing with wrongful convictions have concluded that in over half of such cases the wrongful convictions were obtained as a result of coerced confession or guilty pleas.

Coerced guilty pleas are a problem in Ohio as well as the rest of the nation. An article in the Columbus Dispatch discussed wrongful convictions in several prominent central Ohio cases. In 75% of the cases, the wrongful convictions had been obtained through guilty pleas instead of trials.²

¹ FrontLine: The Plea, June 17, at 9 P.M. on PBS, as summarized <http://www.truthinjustice.org/the-plea.htm>

² Yarnall, *Struggling Over No Easy after Wrongful Conviction*, Columbus Dispatch, December 21, 1996, § K at 2.

Even guilty people face pressure to plead to charges that they are not guilty of because they were overcharged or facing multiple counts for the same conduct. They can be forced to enter pleas in order to minimize the consequences, even if this means pleading to charges greater than actually were committed. Some trial judges are known to charge a trial tax or excessive rent for the courtroom to those who lose.

The pressure on innocent people to plead guilty is immense. So is the pressure of a guilty person to plead to charges greater than he actually committed in order to avoid the consequences of trial. Ohio had recognized that injustice does occur as a result of the tremendous pressure imposed upon people to plead guilty and legal protections have been implemented to help ensure that guilty pleas are entered voluntarily and knowingly.

The Ohio Supreme Court, in accordance with the power granted it by the Ohio Constitution, promulgated rules to help ensure a degree of fairness when the courts accept guilty pleas. Ohio Rule of Criminal Procedure 11(C)(2) sets forth the following guidelines for guilty pleas in felony cases:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and **shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:**

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of, and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, **and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.** [Bold emphasis added]

Thus, even if *Boykin v. Alabama* did not require an oral advisement of constitutional rights, as claimed by the petitioner, it does not matter because Ohio law expressly requires it.

This matter was brought to the Ohio Supreme Court's attention because of the issue of how this rule should be interpreted. Courts had held that the non-constitutional rights provided for in the rule did not have to be strictly complied with and that substantial compliance with respect to advising the defendants of the non-constitutional rights could suffice to fulfill the intent of the rule.

However an odd quirk developed in Ohio case law with respect to the standard of compliance regarding the constitutional rights set forth in Ohio Crim.R. 11(C)(2)(c). Some courts, including the Ohio Supreme Court, had held that strict compliance was required by the trial courts when advising the defendants of the constitutional rights the defendants were waiving by pleading guilty. However, other courts treated the rights a little differently. Some had held that trial courts only had to strictly comply with the rule with respect to some of the constitutional

rights and that substantial compliance was adequate with respect to the other constitutional rights.

This reasoning was based, in part, upon the fact that the courts had observed that in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, (1969), the Court had mentioned only three of the five listed constitutional rights. The courts noted that since *Boykin* had not specifically stated that the defendant should be advised that a guilty plea is a waiver of his right to have the state prove him guilty beyond a reasonable doubt, this right did not rise to the same level of dignity as the other constitutional rights listed in the rule and that substantial compliance with this part of the rule was all that was required.

Other courts had rejected this reasoning by noting that at the time *Boykin* was decided in 1969 there was some question about whether or not the right to have the state prove guilt beyond a reasonable doubt was a federal constitutional right that extended to the states through the Due Process Clause. The courts noted that this issue was clearly resolved in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1063, 25 L.Ed.2d 368, (1970), when the Court held that this basic and fundamental federal constitutional standard also applied to the states. The courts noted that it would make no sense to hold that the courts had to strictly comply with the rule with respect to some of the constitutional rights but only had to substantially comply with the admonitions regarding the other two constitutional rights. The courts reasoned that it made no sense to hold that a person must be strictly informed that he has a right to confront witnesses before his plea can be properly entered but that

the plea can be properly entered if the trial court fails to inform him that a guilty plea is a waiver of his right to have a trial where the state must prove his guilt beyond a reasonable doubt.

The Ohio Supreme Court held that it was going to apply the same standard of enforcement to all of the constitutional rights contained in the rule. The court held in its syllabus and also at ¶ 31:

We hold that a trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R. 11(C)(2)(c), applied.)

Thus this case involves nothing more than the Ohio Supreme Court's determination of how a state rule is to be interpreted, applied, and enforced. This does not become a constitutional issue unless the ruling or its application offends a constitutional provision. As previously noted, the Ohio Supreme Court's ruling did not offend any constitutional provision. If anything, it acted with respect to important constitutional rights.

The state has no constitutional right to keep defendants uninformed of their constitutional rights that would trump the application of Ohio's properly promulgated rule of law. If the court had ruled that trial judges did not have to strictly comply with the rule, then there would be an issue under existing case law as to whether the defendant's constitutional rights were violated. But even if there

existed no constitutional rights regarding knowing and voluntary guilty pleas, the state would be free to enact rules regarding the procedure to be followed when accepting such pleas and the state could not argue that it had a constitutional right not to follow the state law because the United States Constitution did not mandate such a procedure.

REASONS FOR DENYING THE PETITION

As previously noted, the Ohio Supreme Court's decision requiring strict compliance with a portion of one of its rules of procedure does not violate any constitutional provision. Any due process argument would have to hinge upon the premise that the strict compliance ruling places too much of a burden upon the trial courts of Ohio and would result in unfair or unjust outcomes offensive to the interest of justice. This is just not the case.

It is not asking too much of trial courts, who have taken oaths to uphold and enforce the law, to comply with a rather simple rule of procedure designed to impart fairness into guilty plea proceedings. In many respects this case is not so much about the rights of the accused as it is about the fundamental process and the dignity of the courts. The Ohio rule is simple. It states that the court shall inform the defendant of five important constitutional rights he is waiving by entering a guilty plea. There is nothing inherently difficult about complying with this rule. It just requires simple reading from a form that all judges have or could easily acquire. A fourth grader could comply with the rule with a few minutes of training. If a judge gets easily confused or loses track of what he or she has read, the form

could be modified to include check marks for each item. If up to 95% of felony convictions are obtained through pleas and it is so simple to inform the defendants of the critical rights they are waiving by entering the plea, why should the Ohio Supreme Court, in its supervisory capacity, not enforce the rule? In the military, even minor rules are enforced so that in critical situations orders will be followed. This is just basic discipline. This is not a minor rule. This is the rule by which most felony convictions are obtained and where defendants waive their most important constitutional rights and safeguards. It might be the single most important rule to our criminal justice system given the inherently coercive nature of the plea process and the fact that almost all of the convictions are obtained through this process.

Thus even if the state could show a constitutional violation, granting a writ of certiorari is still a matter of judicial discretion that will only be granted for compelling reasons under Rule 10 of the rules of this Court. The Ohio Supreme Court held that trial courts should comply with the Ohio rule that requires the trial courts to actually advise defendants that by entering a guilty plea they are giving up (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. The petitioner, the Great State of Ohio, is asking this Court to intervene and relieve the trial courts of this easily fulfilled obligation, which it claims to be unconstitutional. Assuming that it is unconstitutional for Ohio to

promulgate and enforce such a rule of procedure, there is still no compelling reason to consider this case. It is no large burden for the trial courts to strictly comply with this rule of law and most courts do it very simply and expeditiously.

The importance of the issues involved in a case is of major significance in determining whether a writ of certiorari should issue. This Court does not have the time to give full consideration to all cases presenting issues. It must necessarily confine itself to those that reflect the more important legal problems within the realm of its jurisdiction. The problems should be "beyond the academic or episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). Importance is a relative factor for this Court to consider. Historically this Court has looked at the importance of the case with respect to its impact upon society and its effect upon the development of the law. If this Court refuses to grant certiorari what is the worst that will happen? Just a few judges in Ohio, who have not been complying with a very simple procedure, will have to start complying with the law. There is no great or compelling harm in having judges comply with simple rules of procedure designed to safeguard fundamental constitutional rights.

Additionally, a writ of certiorari should not be granted in this case because this matter is in grave danger of becoming moot or of losing its case or controversy status. The respondent received a five-year prison sentence. He is still being incarcerated on these charges and is being held without bail until this matter is resolved. In Ohio, there is no statutory speedy trial rights following an appeal, according to the state of Ohio and the judge involved in the case. This means that

every day that goes by, the interest the respondent has in prevailing herein and of preserving his victory in the Ohio Supreme Court is diminished.

The respondent originally wanted to withdraw his plea because he felt that he was not guilty of the charges because of the lack of any intent to actually cause harm to his wife, an essential element of the crime. However, the respondent is now in his fourth year of a five-year sentence. It is becoming dangerously close to the point where it would be in the defendant's best interest to have the original sentence re-instated rather than to prevail and later go to trial and risk receiving a substantially greater sentence (up to twenty-one years of actual incarceration, less time served), if he lost. Thus if this Court did grant the writ, it would probably be in the respondent's best interest to lose so that he could have the original sentence re-instated rather than to go to trial and risk additional years of imprisonment.

The state of Ohio has managed to keep the respondent incarcerated for well over three years without a trial and without a proper guilty plea proceeding. If this Court grants this writ, the respondent will have no interest in prevailing and this case will no longer have the adversarial nature required by the case or controversy mandate.

CONCLUSION

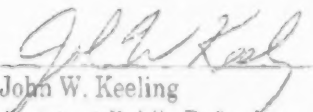
The petitioner went out of its way to obfuscate the fact that this case hinges entirely upon the application of a state rule of procedure requiring trial courts to actually inform defendants of certain constitutional rights that a plea of guilty waives. The Ohio Supreme Court ruled that trial courts must strictly comply with

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this rule. The Ohio Supreme Court's decision rests entirely upon independent state grounds. Thus even if a case could be made that these admonitions are not required under federal law, the Ohio rule of procedure still requires that the trial judge must personally address the defendant and inform him of these rights. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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RULE 9(C) OF THE OHIO RULES OF CRIMINAL PROCEDURE

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

THE STATE OF OHIO, APPELLANT, v. VENEY, APPELLEE.

[Cite as *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200.]

Criminal procedure—Colloquy upon guilty or no-contest plea—Trial court's failure to comply strictly with Crim.R. 11(C)(2)(c) invalidates plea

(Nos. 2007-0656 and 2007-0657 – Submitted May 7, 2008 – Decided

October 9, 2008.)

APPEAL from and CERTIFIED by the Court of Appeals for Franklin County,

No. 06AP-523, 2007-Ohio-1295.

SYLLABUS OF THE COURT

A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R. 11(C)(2)(c), applied.)

MOYER, C.J.

[¶ 1] Once again, we are asked to clarify the duties of the trial court in accepting pleas to felony charges and to determine the consequences of the trial court's failure to comply with Crim.R. 11. The first issue is what level of compliance is required of the trial court when it advises a defendant of the state's burden to prove guilt beyond a reasonable doubt at trial before accepting a plea of guilty or no contest. The second issue is whether a failure to advise the defendant

of this right is subject to harmless-error review under Crim.R. 52.¹ We affirm the judgment of the court of appeals, holding that trial courts must strictly comply with all parts of Crim.R. 11(C)(2)(c) in conducting plea colloquies and that a trial court's failure to inform a defendant of any right in that subsection invalidates the plea.

I. Case Background

[¶ 2] Appellee, Thomas L. Veney, was indicted on one count of felonious assault in violation of R.C. 2903.11 and one count of kidnapping in violation of R.C. 2905.01 along with two firearm specifications as a result of a 2004 event involving his wife, Nicole. As stated by the prosecutor at the plea hearing, Veney had come home from a night of drinking on July 8, 2004, and accused Nicole of sleeping with his cousin. Veney pulled out a loaded gun while in the bedroom, held it on Nicole, and threatened to shoot her. Nicole was lying next to her seven-year-old daughter at the time. The argument eventually moved downstairs, where Veney fired a shot into the wall. Nicole then ran out of the house, and Veney followed her. Nicole saw Veney point the gun at her and heard him fire several more shots. Nicole was able to run to a nearby business to seek help. Nicole's account was corroborated by neighbors who heard the shots and saw Veney holding a gun.

[¶ 3] Veney initially entered a not-guilty plea to all charges but later entered guilty pleas to the lesser included offense of attempted felonious assault and one firearm specification. The other count and firearm specification were

1. The certified question accepted asks whether a trial court must strictly comply with the Crim.R. 11 requirement that it inform the defendant that by entering a felony plea, the defendant waives the right to have the state prove guilt beyond a reasonable doubt. We also accepted the state's discretionary appeal, which offers two related propositions of law: (1) "A substantial compliance standard applies to the advisement required by Crim.R. 11(C)(2)(c) regarding the State's burden of proving guilt beyond a reasonable doubt at trial" and (2) "The failure to give the beyond-reasonable-doubt oral advisement required by Crim.R. 11(C)(2)(c) is subject to harmless-error review and does not always require reversal."

dismissed. The trial court accepted the pleas, found Veney guilty, and sentenced him to two years for felonious assault and three years on the firearm specification for an aggregate prison term of five years. Veney appealed, asserting that his plea was invalid because the trial court had failed to explain the nature of the charges and failed to inform him that the state had to prove him guilty beyond a reasonable doubt at trial.

[¶ 4] The Tenth District Court of Appeals reversed the judgment of the trial court because the trial court did not strictly comply with Crim.R. 11(C)(2)(c) when it failed to orally inform Veney that by entering a guilty plea he waived his constitutional right to have his guilt determined beyond a reasonable doubt at trial. *State v. Veney*, 10th Dist. No. 06AP-523, 2007-Ohio-1295, ¶ 16.² The court of appeals vacated the plea and remanded the case to the trial court for further proceedings. *Id.*

[¶ 5] The court of appeals certified its judgment as being in conflict with the judgments in *State v. Scott* (1996), 113 Ohio App.3d 401, 406-407, 680 N.E.2d 1297; *State v. Cogar* (Oct. 20, 1993), Summit App. No. CA-16234, 1993 WL 413651; and *State v. Shinkle* (Aug. 18, 1998), Scioto App. No. 98CA2560, 1998 WL 546074. We accepted the certified question “[w]hether a trial court must strictly comply with the requirement in Crim.R. 11(C) that it inform the defendant that by entering a plea, the defendant waives the right to have the state prove guilt beyond a reasonable doubt.” *State v. Veney*, 114 Ohio St.3d 1423, 2007-Ohio-2904, 868 N.E.2d 678. We also accepted the two propositions of the state within its discretionary appeal. 114 Ohio St.3d 1425, 2007-Ohio-2904, 868 N.E.2d 679.

[¶ 6] In summary, the state argues that (1) the trial court need only substantially comply with the duty to advise the defendant of the state’s obligation

2. The court of appeals did not consider Veney’s claim that he had not understood the nature of his charges. *Veney* at ¶ 16, fn. 4.

to prove the defendant guilty beyond a reasonable doubt at trial, (2) a flawed plea colloquy does not require automatic reversal, (3) Crim.R. 52 guides the court of appeals as it determines the consequences of the error being reviewed, and (4) under either a harmless-error or plain-error analysis, Veney's plea survives as a knowing, intelligent, and voluntary plea. Veney responds that the trial court's failure to orally advise him of the state's burden of proof as required by Crim.R. 11(C)(2)(c) is constitutional error affecting a substantial right that automatically invalidates his plea.

II. Legal Analysis

[¶ 7] We have clearly stated, "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. The United States Supreme Court has held that a knowing and voluntary waiver of the right to jury trial, the right against compulsory self-incrimination, and the right to confront one's accusers cannot be inferred from a silent record. *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. Crim.R. 11 was adopted in 1973, giving detailed instruction to trial courts on the procedure to follow when accepting pleas.

A. Crim.R. 11(C) Requirement for Plea Colloquy

[¶ 8] Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest. With respect to the required colloquy, Crim.R. 11(C)(2) provides:

[¶ 9] "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following.

{¶ 10} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 11} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶ 12} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶ 13} Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c). Although the constitutional and nonconstitutional portions of this colloquy are categorized separately, we have not always distinguished between the two when examining the adequacy of the court's colloquy with a defendant. In *State v. Caudill* (1976), 48 Ohio St.2d 342, 346, 2 O.O.3d 467, 358 N.E.2d 601, we noted that the provisions of Crim.R. 11(C) must "be scrupulously and literally heeded." Two standards have developed, however, depending upon which type of right is alleged to have been the subject of the court's error in advising the defendant.

B. Substantial Compliance with Crim.R. 11(C)(2)(a) and (b)

{¶ 14} Although we had initially insisted on strict compliance with Crim.R. 11(C), we began to draw a distinction between the notification of constitutional rights and the other information required to be in the colloquy in *State v. Stewart* (1977), 51 Ohio St.2d 86, 5 O.O.3d 52, 364 N.E.2d 1163. In

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Stewart, we held that with respect to the nonconstitutional notifications required by Crim.R. 11(C)(2)(a) and 11(C)(2)(b), substantial compliance is sufficient. *Id.*

{¶ 15} Ohio's substantial-compliance standard was further developed in *State v. Strawther* (1978), 56 Ohio St.2d 298, 10 O.O.3d 420, 383 N.E.2d 900; *State v. Billups* (1979), 57 Ohio St.2d 31, 11 O.O.3d 150, 385 N.E.2d 1308; *State v. Ballard* (1981), 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115; and *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. . We explained: "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect." (Citations omitted.) *Id.* at 108, 564 N.E.2d 474. To demonstrate prejudice in this context, the defendant must show that the plea would otherwise not have been entered. *Id.*

{¶ 16} We have also clarified that in reviewing the totality of the circumstances, a court must determine whether the defendant understood the consequences of waiver. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. Because (1) Griggs had confessed and had signed a written guilty-plea form and (2) Griggs and his counsel assured the court that he was aware of the rights he was waiving, we determined that the trial court had substantially complied with Crim.R. 11, even though the trial court did not orally advise Griggs that accepting the plea was a complete admission of guilt. *Id.* at ¶ 16, 19.

{¶ 17} Our precedent, therefore, establishes that a defendant must show prejudice before a plea will be vacated for a trial court's error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue.

C. Strict Compliance with Crim.R. 11(C)(2)(c)—Notification of Constitutional Rights

{¶ 18} Despite the evolution of substantial compliance as a standard for the court's nonconstitutional notifications and determinations required by Crim.R. 11(C)(2)(a) and (b), the same is not true for the constitutional rights within Crim.R. 11(C)(2)(c). In *Ballard*, we reaffirmed *Caudill's* holding that strict, or literal, compliance was required when constitutional rights are involved. 66 Ohio St.2d at 479, 20 O.O.3d 397, 423 N.E.2d 115. Noting that the preferred procedure is for the trial court to use the language in Crim.R. 11(C), we also stated, "However, failure to [literally comply] will not necessarily invalidate a plea. The underlying purpose, from the defendant's perspective, of Crim.R. 11(C) is to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty." *Id.* at 479-480, 20 O.O.3d 397, 423 N.E.2d 115.

{¶ 19} Crim.R. 11(C)(2)(c) requires that the defendant be advised of the right to a jury trial, the right to confront one's accusers, the privilege against compulsory self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt. The first three are the three constitutional rights originally identified in *Boykin v. Alabama*, 395 U.S. at 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. We recognized notification of the right of compulsory process to obtain witnesses as a fourth constitutional right in *Ballard*. 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, at paragraph one of the syllabus.

{¶ 20} Although the right to be proven guilty by the state beyond a reasonable doubt is one of the five rights included within Crim.R. 11(C)(2)(c), we have never expressly accorded it the same stature as the other four. In fact, in a footnote we suggested that the explanation of the prosecution's burden of proof should be treated differently, subject to a standard of substantial, rather than strict,

compliance. *State v. Sturm* (1981), 66 Ohio St.2d 483, 484, 20 O.O.3d 403, 422 N.E.2d 853, fn. 2. Because of this, the state argues that a trial court need only substantially comply with the obligation to advise a defendant of the prosecution's burden of proof because the right is not specified in *Boykin* as one that is constitutionally required.

{¶ 21} Yet, as the United States Supreme Court held the year after *Boykin*, the right to have the state prove guilt beyond a reasonable doubt is a constitutionally protected right of an accused. *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368. We therefore reject the state's contention and instead hold that the duty to advise the defendant of the right to have guilt proven by the state beyond a reasonable doubt is among the duties of Crim.R. 11(C)(2)(c) with which the court must strictly comply.

D. Consequences of the Court's Failure to Strictly Comply

{¶ 22} Having found that a court must strictly comply with Crim.R. 11(C)(2)(c) when advising a defendant of all five constitutional rights listed, we answer the certified question in the affirmative. Our answer to the certified question does not, however, address the consequences of the court's failure to comply. The state maintains that even if the trial court must strictly comply with Crim.R. 11(C)(2)(c) by informing Veney of the prosecution's burden of proof beyond reasonable doubt, the court's error need not automatically lead to vacation of the conviction and plea. We disagree.

{¶ 23} To properly frame this issue, we must review *Ballard*, which marked the first time that we explicitly made the connection between the strict-compliance standard and the constitutional rights in Crim.R. 11(C)(2)(c); it provides valuable insight into how the standard works in practice.

{¶ 24} In *Ballard*, we cited *Boykin v. Alabama* (1969), 395 U.S. 238, 242-243, 89 S.Ct. 1709, 23 L.Ed.2d 274, for the principles that a defendant must

be apprised of certain constitutional rights³ before his or her plea may be considered intelligent and voluntary and that plain error results when a trial court fails to explain those rights. *Ballard*, 66 Ohio St.2d at 476-477, 20 O.O.3d 397, 423 N.E.2d 115.

{¶ 25} However, we found a split of authority on the issue of “whether the complete omission of a *Boykin* constitutional right alone is cause to nullify a guilty plea.” *Ballard* at 477, 20 O.O.3d 397, 423 N.E.2d 115. Some courts held that the “failure to mention, in any manner, a *Boykin* right does not necessarily result in an involuntary and unknowing guilty plea”; others “held that for a guilty plea to be voluntarily and intelligently entered, the defendant must be informed that he is waiving his *Boykin* rights.” *Id.* at 477-478, 20 O.O.3d 397, 423 N.E.2d 115.

{¶ 26} We adopted the latter view: “[A] guilty plea is constitutionally infirm when the defendant is not informed in a reasonable manner at the time of entering his guilty plea of his [*Boykin* rights].” (Emphasis added.) *Ballard* at 478, 20 O.O.3d 397, 423 N.E.2d 115. We then crystallized this concept in the syllabus with unarguably mandatory language: “Prior to accepting a guilty plea from a criminal defendant, the trial court must inform the defendant that he is waiving his [*Boykin* rights].” (Emphasis added.) *Id.* at paragraph one of the syllabus.

{¶ 27} This requirement is tempered only slightly by the second paragraph of the syllabus: “Failure to use the exact language contained in Crim R. 11(C), in informing a criminal defendant of his [*Boykin* rights], is not grounds for vacating a plea as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant.” (Emphasis added.) *Ballard* at 473, 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, at paragraph

3. In view of our holding in this case, the principles applicable to the “*Boykin* rights” extend to all five rights listed in Crim R. 11(C)(2)(c) in Ohio.

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two of the syllabus, modifying *State v. Caudill* (1976), 48 Ohio St.2d 342, 346, 2 O.O.3d 467, 358 N.E.2d 601. With that holding, we recognized that a trial court can still convey the requisite information on constitutional rights to the defendant even when the court does not provide a word-for-word recitation of the criminal rule, so long as the trial court actually explains the rights to the defendant.

{¶ 28} We look to the record to determine whether a trial court strictly complied with this duty. *Id.* at 481, 20 O.O.3d 397, 423 N.E.2d 115. Following this rule, we upheld Ballard's plea even though the trial court failed to specifically mention the right to a jury trial by name, because the trial court did inform Ballard that " 'neither the Judge nor the jury' " could draw any inference if Ballard refused to testify and that he " 'was entitled to a completely fair and impartial trial under the law.' " *Id.* at 479, 481, 20 O.O.3d 397, 423 N.E.2d 115, fn. 7.

{¶ 29} Thus, pursuant to the strict-compliance standard set forth in *Ballard*, the trial court must orally inform the defendant of the rights set forth in Crim.R. 11(C)(2)(c) during the plea colloquy for the plea to be valid. Although the trial court may vary slightly from the literal wording of the rule in the colloquy, the court cannot simply rely on other sources to convey these rights to the defendant. "We cannot presume a waiver of these * * * important federal rights from a silent record." *Boykin*, 395 U.S. at 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. When the record confirms that the trial court failed to perform this duty, the defendant's plea is constitutionally infirm, making it presumptively invalid. See *Ballard*, 66 Ohio St.2d at 481, 20 O.O.3d 397, 423 N.E.2d 115; *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12.

{¶ 30} In the present case, it is undisputed that the trial court plainly failed to orally inform Veney of his constitutional right to require the state to prove his guilt beyond a reasonable doubt. This failure to strictly comply with Crim.R. 11(C)(2)(c) renders Veney's plea invalid. We therefore affirm the holding of

court of appeals in this regard and remand the matter to the trial court for further proceedings.

III. Conclusion

{¶ 31} We hold that a trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid.

{¶ 32} We answer yes to the certified question and agree with the court of appeals that the trial court must strictly comply with Crim.R. 11 in advising a defendant of constitutional rights. Because the trial court did not inform Veney that he had a right to be found guilty only upon proof beyond a reasonable doubt, it failed to strictly comply with Crim.R. 11(C)(2)(c), and his plea is therefore invalid.

Judgment affirmed
and cause remanded.

PFEIFER, O'CONNOR, and O'DONNELL, JJ., concur.

LUNDBERG STRAITON, LANZINGER, and CUPP, JJ., concur in part and dissent in part.

LANZINGER, J., concurring in part and dissenting in part.

{¶ 33} I agree with the portion of the syllabus that mandates that trial courts when conducting plea colloquies must strictly comply with all parts of Crim.R. 11(C)(2)(c), including informing defendants of the right to be found guilty only upon proof beyond a reasonable doubt; I disagree with the portion of the syllabus that addresses the consequence of lack of strict compliance. I

respectfully dissent from the majority's holding that a trial court's failure to strictly comply with Crim.R. 11(C)(2)(c) requires vacation of the plea and conviction without regard to contrary evidence in the record that the plea was entered knowingly and voluntarily despite the trial court's omission.

{¶ 34} We have held that when a trial judge fails to explain the constitutional rights set forth in Crim.R. 11(C)(2)(c), the guilty or no-contest plea is invalid “under a presumption that it was entered involuntarily and unknowingly.” (Emphasis added.) *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12; see also *State v. Nero* (1990), 56 Ohio St.3d 106, 107, 564 N.E.2d 474, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 242-243, 89 S.Ct. 1709, 23 L.Ed.2d 274. This court has never held, until today, that this presumption is irrebuttable or that a plea must be vacated automatically when the trial court fails to orally explain a constitutional right.

{¶ 35} Interpreting Crim.R. 11(C)(2)(c) as an absolute rule for which imperfect compliance should lead to automatic vacation of a plea in every case, the majority cites *State v. Ballard* (1981), 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115. But the majority's reasoning seems to conflate a single missing oral advisement with the entirely “silent record” referred to *Boykin*. *Ballard*, however, did not foreclose an opportunity for the state to show that there was not a silent record with respect to *Boykin* rights. Just as the state is allowed to rebut the presumption that a warrantless search is unreasonable, the state should be able to rebut the presumption that a plea is involuntary and unknowing when a judge fails to mention one of the constitutional rights in Crim.R. 11(C)(2)(c).

{¶ 36} Allowing the state the chance to rebut the presumption that a defendant has been prejudiced does not confuse the standards of strict compliance and substantial compliance. The majority recognizes that under the substantial compliance standard, the burden is on the *defendant* to show prejudice, which means showing that the plea would otherwise not have been entered. *Nero*, 56

Ohio St.3d at 108, 564 N.E.2d 474. A requirement that the *state* must overcome a presumption of the plea's invalidity when the trial court does not strictly comply with Crim.R. 11(C)(2)(c) means that the defendant need no longer show prejudice. The state simply is given an opportunity to establish through other evidence in the record that the defendant's plea was still knowing and voluntary.

{¶ 37} Moreover, federal law does not require automatic vacation of a plea when a judge fails to inform a defendant of a *Boykin* right. See *United States v. Fonn* (2002), 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90. Instead, the court reviews the entire record—including written pleas and statements that constitutional rights were reviewed with counsel—to determine whether the defendant understood and voluntarily made the plea. *Id.* at 74-75. We have previously adopted this rule in *Ballard*, acknowledging that when determining whether a defendant was adequately informed of his constitutional rights under Crim.R. 11, a court must review the entire record and not just determine whether the judge recited the exact language in the rule. 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, paragraph two of the syllabus.

{¶ 38} To the contrary, the majority opinion now concludes that strict compliance brooks no mistakes by the trial court in its oral recitation to the defendant. In its overly formalistic view of the consequences of failure to strictly comply with Crim.R. 11(C)(2)(c), the majority rejects the idea that a trial court may have informed a defendant of his or her constitutional rights in a number of ways, including written materials that have been reviewed with counsel and signed and assented to in open court. The trial court's overriding obligation has been to ensure that a plea is entered in a knowing and intelligent manner. *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. But now, the majority's holding will invalidate convictions based upon a single omitted oral statement of the trial court, no matter whether the record would otherwise show that the defendant understood and appreciated all constitutional rights being waived.

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{¶ 39} Because I disagree with these draconian consequences as applied to every case, I respectfully dissent. I would hold that the state should have an opportunity to rebut the presumption that a plea is unknowing and involuntary with evidence from the entire record.

LUNDBERG STRATTON and CUPP, JJ., concur in the foregoing opinion.

Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, for appellant.

Ycira R. Venters, Franklin County Public Defender, and John W. Keeling, Assistant Public Defender, for appellee.

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No. 08-1018

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

THE STATE OF OHIO,
Petitioner,

v.

THOMAS L. VENEY,
Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of Ohio**

**REPLY BRIEF OF PETITIONER
STATE OF OHIO**

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ARGUMENT

At the time respondent pleaded guilty, the Ohio trial court did not orally advise him that his plea was waiving his right to require the prosecution to prove his guilt at a trial beyond a reasonable doubt. However, the beyond-reasonable-doubt right and respondent's understanding that he was waiving that right were set forth in a written Entry of Guilty Plea, which respondent orally acknowledged approving. Respondent also orally acknowledged having reviewed his constitutional rights with his counsel.

Respondent does not dispute the three major bases asserted by petitioner Ohio for granting certiorari

review. In particular, respondent does not dispute that the overwhelming majority of case law, including almost all federal circuits, has concluded that federal due process under *Boykin v. Alabama*, 395 U.S. 238 (1969), does not require any oral advisement. Under *Boykin*, the record need only affirmatively disclose in some way that the defendant was aware of the *Boykin* rights he was waiving.

Respondent also does not dispute that a fair number of courts have concluded that the beyond-reasonable-doubt right is not a *Boykin* right.

Respondent also does not dispute that this Court has previously concluded that the omission of a plea advisement does not amount to structural error always requiring reversal. *United States v. Dominguez-Benitez*, 542 U.S. 74 (2004). Respondent does not even address the written Entry of Guilty Plea, which Entry shows that the omission of the oral advisement was not prejudicial.

Finally, respondent does not dispute that petitioner Ohio's asserted grounds for seeking certiorari were fully preserved below.

Instead of directly challenging the strong grounds for granting certiorari, respondent asserts that the Ohio Supreme Court's ruling was only a state-law ruling determining the reach of Ohio's Crim.R. 11(C)(2)(c). Respondent asserts that the Ohio Supreme Court was merely exercising "supervisory power" in determining that the omission of the oral advisement under the rule would always require reversal. For the following reasons, these contentions lack merit.

While respondent argues that “[t]he Ohio Supreme Court’s decision rests entirely upon independent state grounds,” see Brief in Opposition, at 18, respondent does not address this Court’s “plain statement” standard. As this Court recently reiterated, “[t]his Court has jurisdiction whenever ‘a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.’” *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. ___, 129 S.Ct. 1436, 1442 (2009), quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

At the very least, the Ohio Supreme Court’s ruling represents an interwoven mixture of federal constitutional law and state criminal procedure. The Ohio Supreme Court determined the issue of “strict compliance” by reference to whether the plea was “constitutionally infirm.” Such a ruling provides a sufficient basis for jurisdiction. See, e.g., *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (“We have jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law.”).

The fairest reading is that the Ohio Supreme Court was primarily basing its ruling on federal constitutional law. The Ohio Supreme Court rejected the prosecution’s arguments that *Boykin* was not violated. The Court cited *Boykin* eight times in the key passages from paragraphs 24 through 30 in reaching the conclusion that the plea was “constitutionally infirm.” In reaching this “constitutionally infirm” conclusion, the Court also relied heavily on *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), which itself was a federal constitutional rul-

ing determining “what does *Boykin* require of a trial court.” *Id.* at 476, 423 N.E.2d at 117.

B.

No part of the ruling shows that the Court based its ruling solely on “supervisory power” over the administration of Ohio’s Crim.R. 11(C)(2)(c). The frequent citations to *Boykin* and *Ballard* belie any narrow “supervisory” holding, as does the fact that the Court never mentioned a “supervisory” basis for decision.

In addition, the Court acknowledged that it would not have adopted an automatic-reversal principle if the case had involved only a nonconstitutional error. The Court stated at paragraph 17 that “[o]ur precedent * * * establishes that a defendant must show prejudice before a plea will be vacated for a trial court’s error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue.” If the Court had agreed with the prosecution that only a “nonconstitutional aspect” was involved in the failure to give the oral beyond-reasonable-doubt advisement, the Court would have required a showing of prejudice, and the prosecution would have prevailed, since the Entry of Guilty Plea established the lack of prejudice.

The Court also would not have disregarded Ohio’s Crim.R. 52(A), which provides that harmless errors shall be disregarded. Only constitutional error could amount to error always requiring reversal. *State v. Colon*, 118 Ohio St.3d 26, 2008 Ohio 1624, 885 N.E.2d 917, ¶ 21 (2008). Ohio appellate courts have only a narrow power to reverse. “In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings.”

State v. Wamsley, 117 Ohio St.3d 388, 2008 Ohio 1195, 884 N.E.2d 45, ¶ 19 (2008). Only an error of purported constitutional dimension requiring automatic reversal could countermand the Ohio Supreme Court's otherwise-extant need to comply with Ohio's Crim.R. 52.

To be sure, the Ohio Supreme Court *could* have confined itself to the issue of how it would enforce its mere criminal-rule requirement. If the Court had done so, the prosecution could not seek certiorari review here. But if the Court had done so, the prosecution would have no need to seek review, since the prosecution would have prevailed under the standards of "substantial compliance" and harmless-error review that Ohio law otherwise recognizes.

It bears emphasis that "errors of state law do not automatically become violations of due process." *Rivera v. Illinois*, 556 U.S. ___, 129 S.Ct. 1446, 1455 (2009). "The Due Process Clause * * * safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial." 129 S.Ct. at 1454 (internal quotation marks omitted). Ohio's Crim.R. 11 could not amend the Constitution. See *United States v. Timmreck*, 441 U.S. 780, 783-84 (1979).

C.

The constitutional nature of the Ohio Supreme Court's ruling should have come as no surprise to respondent, who specifically argued for such a ruling. Respondent repeatedly cited *Boykin* and argued that "[c]ourts must strictly comply with the constitutional requirements of Crim.R. 11(C)(2)(c) * * *." (Defense Merit Brief, at p. 3) As the defense argued below:

The criminal rules state that a judge shall not accept a plea without informing the defendant and determining that he understands that, by entering the plea, he is waiving his right to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial. *This is unquestionably a federal constitutional right that applies to the states through the Due Process Clause.* It is a right that one must be aware of before any guilty plea can be knowingly and intelligently made.

(*Id.* at p. 11; emphasis added) As the defense further argued below:

The judge has an express duty to make a proper record and to inform the defendant that the state is required to prove his guilt beyond a reasonable doubt at trial and to determine that the defendant understands this right. The trial court *completely failed to abide by the Constitution* and the law in this regard and it cannot be concluded that the defendant's guilty plea was knowingly and voluntarily entered.

(*Id.* at p. 17; emphasis added)

The Ohio Supreme Court naturally took these arguments to mean that respondent was seeking a constitutional ruling. In paragraph six of its opinion, the Court summarized respondent's argument as contending "that the trial court's failure to orally advise him of the state's burden of proof as required by Crim.R. 11(C)(2)(c) is *constitutional error* affecting a substantial right that automatically invalidates his plea." (Emphasis added)

While respondent accuses petitioner Ohio of "obfuscat[ing]" the basis for the Ohio Supreme

Court's ruling, respondent himself is the party who insisted that the error was of constitutional dimension. The Ohio Supreme Court adopted that argument, and this Court now has jurisdiction to review these constitutional issues.

D.

Respondent errs in claiming that petitioner Ohio is asserting its own due-process rights and that petitioner can have no objection when the Ohio Supreme Court provides greater protection to criminal defendants. Petitioner is *not* claiming any due-process right of its own, but, rather, petitioner is claiming that the Ohio Supreme Court went too far by finding due-process error. *Respondent* set up a constitutional/due-process claim, and the Ohio Supreme Court sustained that claim. This Court has jurisdiction to address whether the state court correctly sustained respondent's constitutional claim. 28 U.S.C. § 1257(a) (review allowed "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution").

As for the contention that the Ohio Supreme Court could have provided greater protection to respondent as a matter of state law, the problem is that the Court did not purport to do so. Instead, the Court provided greater protection based at least in substantial part on its view of what the federal constitution required. This Court can and will review state-court rulings that err in a criminal defendant's favor vis-à-vis a federal constitutional issue. *See, e.g., Kansas v. Ventris*, 556 U.S. ___, 129 S.Ct. 1841 (2009); *Vermont v. Brillon*, 556 U.S. ___, 129 S.Ct. 1283 (2009); *Kansas v. Marsh*, 548 U.S. 163 (2006); *Brigham City v. Stuart*, 547 U.S. 398 (2006).

"Turning a blind eye to federal constitutional error that benefits criminal defendants, allowing it to permeate in varying fashion each State Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt." *Marsh*, 548 U.S. at 185 (Scalia, J., concurring). "[I]t cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the *independence* of an alleged state ground is not apparent from the four corners of the opinion." *Long*, 463 U.S. at 1040 (emphasis *sic*).

E.

While respondent contends that the case is unimportant because it will merely result in Ohio trial-court judges complying with an oral-advisement requirement imposed by state law, respondent unwittingly concedes the importance of this case by emphasizing that the vast majority of cases are disposed through plea-based proceedings. Issues regarding the exact reach of *Boykin* and the availability of harmless-error review therefore potentially affect the vast majority of cases. The *Boykin* issues are recurring, and courts throughout the nation could potentially benefit from a ruling by this Court. This Court could also benefit, since, if an oral beyond-reasonable-doubt advisement is constitutionally required, then Fed.R.Crim.P. 11 would need amendment, as it does not currently require such an advisement.

F.

Respondent's claim that the case is in danger of becoming "moot" is perplexing. There is no danger of mootness. The issues of whether the plea proceeding was invalid and/or requires reversal both create a

live controversy, as decisions on those issues would directly affect whether respondent's conviction will be reinstated or whether the case must be re prosecuted in the trial court.

Respondent errs in contending that his present detention in the county jail somehow might result in a mooting of the case while certiorari review remains pending. Respondent assumes that he is serving a five-year sentence and that the five-year term might run out before this Court rules. But there is no five-year sentence in place at this point, since that sentence has been vacated and respondent has been returned to the county jail to await further trial-court proceedings. The original five-year sentence could be reinstated only if this Court accepts review. The trial court is properly awaiting word on whether this Court will accept review. Petitioner Ohio agrees that respondent potentially faces a total of up to twenty-one years on the reinstated charges at this point.

Respondent is being held without bail because his bail was revoked due to his failure to appear in the case for over one year from November 2004 to January 2006 when the case was originally pending in the trial court.

Even if a five-year sentence were being served now, that sentence still would not run out before this Court could be expected to rule. The five-year sentence would not have been expected to expire until December 2010. If this Court grants review by the end of June 2009 or at the start of the October 2009 term, a ruling could be expected by June 2010, well before a five-year sentence would expire.

Respondent's mootness argument also ignores the fact that he had received a mandatory three-year

term of "post-release control" under Ohio law, which is a special parole term that must be served after service of the five-year sentence.

Respondent's suggestion that he might abandon defense of the Ohio Supreme Court's ruling is also easily addressed. If such abandonment occurs, this Court could appoint a counsel as special amicus for this Court to defend the lower-court ruling. *See, e.g., Bousley v. United States*, 523 U.S. 614, 618 (1998). Abandonment by respondent would not "moot" the case.

CONCLUSION

In light of the foregoing arguments, petitioner Ohio stands by its petition for writ of certiorari and respectfully requests that this Court grant the petition.

Respectfully submitted,

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